No. 00-1621

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GWI PCS 1, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11294

IN THE MATTER OF: GWI PCS 1 INC.;
GWI PCS 2 INC.; GWI PCS 3 INC.;
GWI PCS 4 INC.; GWI PCS 5 INC.;
GWI PCS 6 INC.; GWI PCS 7 INC.;
GWI PCS 8 INC.; GWI PCS 9 INC.;
GWI PCS 10 INC.; GWI PCS 11 INC.;
GWI PCS 12 INC.; GWI PCS 13 INC.;
GWI PCS 14 INC.; General Wireless INC.;
GWI PCS INC., Debtors

UNITED STATES OF AMERICA, ON BEHALF
OF FEDERAL COMMUNICATIONS COMMISSION,
APPELLANT

v.

IN THE MATTER OF: GWI PCS 1 INC.;
GWI PCS 2 INC.; GWI PCS 3 INC.;
GWI PCS 4 INC.; GWI PCS 5 INC.;
GWI PCS 6 INC.; GWI PCS 7 INC.;
GWI PCS 8 INC.; GWI PCS 9 INC.;
GWI PCS 10 INC.; GWI PCS 11 INC.;
GWI PCS 12 INC.; GWI PCS 13 INC.;
GWI PCS 14 INC.; General Wireless INC.;
GWI PCS INC., Appellees

Appeal from the United States District
Court for the Northern District of Texas

[Oct. 20, 2000]

Before: GARWOOD, WIENER and DEMOSS, Circuit Judges.

GARWOOD, Circuit Judge:

The Federal Communications Commission (FCC), on behalf of the United States, appeals from the district court's judgment affirming a bankruptcy reorganization plan for debtors General Wireless, Inc. (GWI), GWI PCS, Inc. (GWI PCS), and GWI PCS 1, GWI PCS 2, GWI PCS 3, GWI PCS 4, GWI PCS 5, GWI PCS 6, GWI PCS 7, GWI PCS 8, GWI PCS 9, GWI PCS 10, GWI PCS 11, GWI PCS 12, GWI PCS 13, GWI PCS 14 (the subsidiary debtors), (collectively, the Debtors). The reorganization plan included an order that the subsidiary debtor's and GWI PCS's obligation to pay $954 million to the FCC, evidenced by promissory notes signed by the subsidiary debtors, as part of GWI PCS's winning bids for fourteen radio-spectrum licenses at an FCC auction, was a constructive fraudulent transfer under 11 U.S.C. § 548. The bankruptcy court therefore avoided approximately $894 million of the $954 obligation to the FCC and allowed the subsidiary debtors to retain the licenses. The FCC now appeals the avoidance judgment, arguing that its appeal of the avoidance judgment is not equitably moot and that the bankruptcy court improperly assumed the FCC's regulatory authority and erred in avoiding $894 million of the obligation to the FCC. We affirm.

Facts and Proceedings Below

In 1993, Congress passed several amendments to the Federal Communications Act (FCA), including section 309(j). *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387 (1993).

Section 309(j) authorized the FCC to sell electromagnetic licenses for personal communications services (PCS) to private companies by auction. Section 309(j) also required the FCC to design auctions that "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D)*; see* 47 U.S.C. § 309(j)(3)(B). To further this directive, the FCC reserved the C and F-blocks of the electromagnetic spectrum[1] for auction to small, entrepreneurial companies referred to as "designated entities." *See* 47 C.F.R. § 24.709 (1995).

The C-block auction began in December 1995 and ended on May 6, 1996. On December 18, 1995, GWI made the initial payment of approximately $53 million to qualify GWI PCS, a subsidiary of GWI, to bid at the C-block auction.[2] At the conclusion of the C-block

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1 The megahertz of radio frequency determines the carrying capacity of a block of wireless spectrum, and the FCC had divided the electromagnetic spectrum allocated to PCS licenses into "blocks" designated as the A, B, C, D, E, and F-blocks. The A, B, and C-blocks consist of 30 megahertz of spectrum, while the D, E, and F-blocks of 10. Another measurement, a "pop", represents 1000 persons within the geographic area covered by a particular licensing block. Dollars per megahertz-pop, a generally accepted industry measurement standard, represents the amount paid for a license that would allow the provision of a particular level of communications data to a particular number of people.

2 As part of the FCC's C-block auction rules, bidders were required to deposit "qualifying amounts" in order to participate in the auction. *See* 47 C.F.R. § 24.711(a)(1) (1995) ("Each eligible bidder for licenses on frequency Block C subject to auction shall pay an upfront payment of $0.015 per MHz per pop for the maximum number of licenses (in terms of MHz-pops) on which it

auction, GWI PCS was the high bidder for fourteen PCS licenses, covering areas in Southern Florida, Northern California, and Atlanta, Georgia. *See In re Application of GWI PCS, Inc.*, 12 F.C.C.R. 6441 ¶ 2, 1997 WL 159931 (Jan. 27, 1997). GWI PCS's winning bids were each approximately five percent higher than the next-highest bid and totaled approximately $1.06 billion.[3] On May 22, 1996, GWI PCS filed license application forms for the fourteen licenses. *See* 47 C.F.R. § 24.707 (1995)[4]. On May 31, 1996, the FCC released a public notice accepting GWI PCS's applications for the licenses and setting July 1, 1996 as the cut-off date for parties in interest to file objections, pursuant to 47 C.F.R. § 24.830 (1995), to GWI PCS receiving the licenses. *See In re Application of GWI PCS, Inc.*, 12 F.C.C.R. 6441 ¶ 2, 1997 WL 159931 (Jan. 27, 1997). Two parties did object, contending that GWI PCS had violated the foreign ownership restrictions, *see* 47 U.S.C.

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intends to bid pursuant to § 1.2106 of this chapter and procedures specified by Public Notice.").

[3] The C-block auction resulted in the awarding of 493 C-block licenses to approximately 90 designated entities for a total bid amount of approximately $10.2 billion.

[4] 47 C.F.R. § 24.707 states as follows:

> "Each winning bidder will be required to submit a long-form application on FCC Form 600, as modified, within ten (10) business days after being notified that it is the winning bidder. Applications on FCC Form 600 shall be submitted pursuant to the procedures set forth in Subpart I of this Part and § 1.2107(c) and (d) of this Chapter and any associated Public Notices. Only auction winners (and applicants seeking partitioned licenses pursuant to agreements with auction winners under § 24.714) will be eligible to file applications on FCC Form 600 for initial broadband PCS licenses in the event of mutual exclusivity between applicants filing Form 175. Winning bidders need not complete Schedule B to Form 600."

§ 310(b), 47 C.F.R. § 24.804(b) (1995), and the rules against collusive bidding, *see* 47 C.F.R. § 1.2105(c) (1995)[5]. *See In re Application of GWI PCS, Inc.*, 12 F.C.C.R. 6441 ¶ 4, 1997 WL 159931 (Jan. 27, 1997). After investigating the bases for the objections, the FCC concluded that GWI PCS did not exceed the foreign ownership limitations and that there was insufficient evidence to find that GWI PCS had violated the FCC's rules prohibiting collusion in the bidding process. *See id.* ¶ 5.

On January 27, 1997, the FCC approved the granting of the fourteen licenses for which GWI PCS was the high bidder. *See Wireless Telecommunications Bureau Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block Licenses to GWI PCS Inc.*, 12 F.C.C.R. 1215, 1997 WL 28957 (Jan. 27, 1997). At GWI's request, each license was conditionally transferred to one of the fourteen subsidiary debtors.[6] *See id.* at n.1. On February 3, 1997, GWI paid the second half of the down-payment, $53 million, for the licenses on behalf of the subsidiary debtors. On

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5 47 C.F.R. § 24.701 provides that the competitive bidding procedures for broadband PCS incorporate "[t]he general competitive bidding procedures found in 47 CFR Part 1, Subpart Q . . . unless otherwise provided in [47 C.F.R. Part 24, Subpart H]."

6 Pursuant to the FCC regulations issued under 47 U.S.C. § 309(j), winning bidders that were "small businesses" were required to pay only 10 percent of their winning bids in cash; the remaining 90 percent could be paid in installments over a ten-year period at below market interest rates. *See* 47 C.F.R. §§ 1.2110(e), 24.711(b) (1995). The transfer of the licenses remained contingent on the subsidiary debtors signing the notes and the depositing of the remaining 5 percent of the down-payment; however, upon the execution of the notes on March 10, 1997, the licenses became effective as of January 27, 1997.

March 10, 1997, the fourteen subsidiary debtors executed notes to the FCC for amounts totaling approximately $954 million—the sum of the winning bids for the fourteen licenses less the ten percent in downpayments made by GWI. The notes were sent to the FCC by Federal Express on March 13, 1997 and were received by the FCC on March 14, 1997.

In early 1997, a significant number of C-block licensees, experiencing difficulties in securing financing and facing the prospect of early default on their installment payments to the FCC, petitioned the FCC for relief from their licenses' installment payments.[7] In February 1997, the FCC suspended the C-block installment payments and commenced rule-making pro-

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[7] These difficulties were generally limited to the winning bidders at the C-block auction, because the winning bids at the A, B, D, E, and F-block auctions were considerably lower than the winning bids at the C-block auction when measured in dollars per megahertz-pop, *see supra* note 1. The average winning bid at the A and B-block auctions held in March 1995 was $.50 per megahertz-pop. At the D, E, and F-block auctions concluded in January 1997, the average winning bid for the D and E-blocks, in cash, was approximately $.35 per megahertz-pop, and for the F-blocks, which like the C-block auction was reserved for qualified entities and thus subject to favorable ten-year financing, was $.25 per megahertz-pop. In contrast, the average winning bid at the C-block auction in May 1996 was considerably higher per megahertz-pop. One of the reasons proffered for the steep decline in the value of C-block licenses after the May 1996 auction was the FCC's decision to auction the D, E, and F-blocks after the C-block auction was concluded but before the C-block licenses were to be issued, thereby greatly increasing the volume of licenses soon to be available for purchase at auction. For a general survey of the difficulties facing C-block licensees, see Carolyn Hochstadter Dicker, *PCS Licenses and the "Specter" of Bankruptcy*, 6 COMMLAW CONSPECTUS 59 (1998).

ceedings to address the problems faced by C-block licensees. Following six months of administrative proceedings, the FCC issued an order on October 16, 1997, the Restructuring Order, that provided C-block licensees with several options to ease their financial difficulties, including allowing a licensee to return all or portions of a license to the FCC in exchange for significant debt reduction. *See In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 12 F.C.C.R. 16436, 1997 WL 643811 (Sept. 25, 1997). The FCC, however, expressly rejected proposals that would have allowed licensees to retain their licenses without paying their winning bids in full, because, in the FCC's view, the C-block auction had been designed to ensure that the licenses were to be allocated to users who could demonstrate, through their ability to pay the highest price, that they possessed the most highly valued use for the licenses. *See id.* ¶ 5. In response to numerous requests for reconsideration of the Restructuring Order, the FCC altered the Restructuring Order slightly in March 1998 to allow licensees greater flexibility in making their decisions regarding the options provided in the Restructuring Order; however, the basic framework of the Restructuring Order was retained. *See In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 13 F.C.C.R. 8345, 1998 WL 130176 (Mar. 23, 1998).

The subsidiary debtors did not elect to pursue one of the options for relief presented by the FCC in the Restructuring Order. Instead, on October 20, 1997, the subsidiary debtors filed voluntary bankruptcy petitions under chapter 11 in the Northern District of Texas. On October 29, 1997, the subsidiary debtors initiated an adversary proceeding against the FCC, in part to avoid their payment obligations under the promissory notes executed in March 1997 on the basis that those obligations constituted constructive fraudulent transfers for which the subsidiary debtors had received less than reasonably equivalent value, *i.e.*, the licenses were worth less than the notes, and had become insolvent as a result. On January 26, 1998, GWI and GWI PCS also filed for bankruptcy protection, and their chapter 11 cases were consolidated with those of the fourteen subsidiary debtors. In an amended complaint, GWI and GWI PCS joined the adversary proceeding against the FCC, seeking to avoid any obligation that they may have incurred to pay the balance of the bid price to the FCC. The FCC defended against the Debtors' attempt to avoid the obligations by arguing, *inter alia*, that the value of the licenses received by the Debtors should be measured as of the date the C-block auction closed, May 8, 1996, and that the sixteen GWI entities should be collapsed and treated as a single entity. In addition, the FCC maintained that, if the bankruptcy court allowed the subsidiary debtors to retain the licenses without paying the bid price, the FCC's regulatory authority will be effectively usurped through the bankruptcy proceeding and the terms of license ownership as set forth in FCC regulations will be improperly altered through bankruptcy.

After conducting a trial on the adversary proceeding from April 13, 1998 through April 17, 1998, the bankruptcy court in a bench ruling on April 24, 1998 granted the relief sought by the Debtors. The bankruptcy court found that, although the value of the fourteen C-block licenses on the date the auction closed, May 8, 1996, was $1.06 billion, the licenses' value had declined to $166 million by January 27, 1997,[8] the date the FCC conditionally granted the licenses to the subsidiary debtors who then became obligated to pay the remaining balance of GWI PCS's bids.[9] In addition, the bankruptcy court found that when the subsidiary debtors executed the notes, they held assets totaling $2 million plus the fourteen licenses valued at $166 million with debts, represented by the notes, of approximately $954 million, thereby rendering the subsidiary debtors insolvent. The bankruptcy court also ruled that the GWI corporations were all separate legal entities, declining to treat them as one under the FCC's alter ego theory[10], and refused to set the date the auction closed,

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[8] The bankruptcy court found that the licenses dropped in value to between $132 million and $200 million and appears to have simply split the difference in arriving at the $166 million figure.

[9] The bankruptcy court also determined that the value of the licenses did not change between January 27, 1997 and March 14, 1997; and that therefore, whether the transfer of the licenses from the FCC to the subsidiary became effective on January 27, 1997—the date the licenses were awarded—or on March 14, 1997—the date the notes securing the obligation to pay the remaining $954 million were received by the FCC—was of no moment to the value of the licenses for purposes of avoidance.

[10] With regard to this conclusion, the bankruptcy court stated as follows in its oral ruling:

> "The separate corporations, all being separate legal entities, shall not be considered the alter ego of the parent debtor. The debtors perpetuated no sham or fraudulent transaction on the government. Indeed, the debtors acted in good faith, following all FCC regulations and rules. The government has not established the applicability of any common law alter ego theory.

May 8, 1996, as the date to evaluate the transfer of the licenses, because the bankruptcy court reasoned that it was not until January 27, 1997 that the licenses were issued by the FCC and the transfer completed. Thus, January 27, 1997 became the date for determining avoidability of the notes. The bankruptcy court therefore ruled that the obligation incurred to the FCC above the actual value of the licenses on January 27, 1997, or $894 million, was a constructive fraudulent transfer, avoidable under 11 U.S.C. § 548[11]. The

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> The government contends, however, that federal case law recognizes situations when corporate form should be ignored, if necessary, to preserve or protect some public policy.
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> . . .
>
> As the Court has found, there is no evidence of a fraud or that the corporate structure was used as a sham. GWI had legitimate business purposes for the use of the corporate form, which the FCC recognized as common and approved. The subsidiaries were not created to be a conduit or agent . . . , but to be operating entities in their respective areas of the country. This Court should, therefore, honor the separate corporate entities."

Before the bankruptcy court, the FCC sought to hold GWI responsible for the notes and bids under an alter ego theory. As GWI did not participate in the actual bidding at the C-block auction and did not sign any promissory notes, in the absence of alter ego, GWI incurred no obligation towards the unpaid balance of the bid price. The FCC did not appeal the foregoing finding to the district court and does not raise it before this Court.

[11] 11 U.S.C. § 548, prior to being amended in 1998, stated as follows:

> "(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such bankruptcy court similarly avoided GWI PCS's obligation to the FCC, reasoning that GWI PCS did not incur any obligation to pay the remainder of the $1.06 billion auction price for the licenses until the remaining five percent down-payment was made, the formal application for the licenses was submitted, and the licenses were obtained after the FCC's regulatory process and review. Therefore, the bankruptcy court

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transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section—

(A) 'value' means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in section 101(34), 741(5), or 761(15) of this title, or settlement payment, as defined in section 101(35) or 741(8) this title, takes for value to the extent of such payment;

(C) a repo participant that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, in connection with a repurchase agreement, takes for value to the extent of such payment; and

(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer."

11 U.S.C. § 548 (1996).

concluded that GWI PCS's obligation to pay the remainder of the bid price was not incurred until January 27, 1997. The bankruptcy court also rejected the FCC's argument that non-payment of the entire obligation resulted in cancellation of the licenses. On June 4, 1998, the bankruptcy court entered judgment on the avoidance claim[12], reducing the remaining payment obli-

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[12] In its final judgment on the avoidance claims, the bankruptcy court ordered, in relevant part, that:

> "1. the obligations that GWI PCS, Inc. ('PCS') incurred to the United States, acting through the Federal Communications Commission ('FCC'), on May 8, 1996 are not avoided because as of that date, PCS received reasonably equivalent value in exchange for those obligations;
>
> 2. the obligations that GWI PCS 1, Inc., GWI PCS 2, Inc., GWI PCS 3, Inc., GWI PCS 4, Inc., GWI PCS 5, Inc., GWI PCS 6, Inc., GWI PCS 7, Inc., GWI PCS 8, Inc., GWI PCS 9, Inc., GWI PCS 10, Inc., GWI PCS 11, Inc., GWI PCS 12, Inc., GWI PCS 13, Inc., and GWI PCS 14, Inc. (the 'Subsidiary Debtors') and PCS incurred to the United States, acting through the FCC, on January 27, 1997 are avoided pursuant to 11 U.S.C. § 548(a)(2)(A) and (B)(i) & (ii), because the Subsidiary Debtors and PCS did not receive reasonably equivalent value in exchange for these obligations, and on this date, the Subsidiary Debtors and PCS were or became insolvent and were undercapitalized for the contemplated business activity they intended to pursue;
>
> 3. pursuant to 11 U.S.C. § 548(c), the obligations of PCS and the Subsidiary Debtors to the United States are reduced to a $60 million, which amount is the difference between the value of the obligations as of January 27, 1997—$166 million—and the $106 million already paid on the obligations, and which amount is

gations for the fourteen licenses from approximately \$954 million to \$60 million[13], which amount is secured by the licenses.[14] The FCC then appealed the avoidance order to the district court, maintaining that the Debtors remained obligated for the full face value of the notes and that the bankruptcy court erred in avoiding approximately \$894 million of the subsidiary debtors' and GWI PCS's obligation to the FCC.[15]

> secured by the licenses issued by the FCC to the Subsidiary Debtors."

[13] The \$60 million figure represents the value of the licenses on January 27, 1997, \$166 million, less the two \$53 million downpayments made by GWI.

[14] As an alternative remedy to avoidance, the Debtors moved the bankruptcy court to rescind the notes. Avoidance differs considerably from rescission. Rescission unwinds the transaction and restores the status quo ante, whereas avoidance allows a debtor to retain the benefit of its bargain while rewriting the debtor's obligations under that bargain. The bankruptcy court declined to order a rescission of the notes, *see* 11 U.S.C. §§ 105 & 550, as it would have required a reauction of the fourteen licenses, resulting in further delay in the development of licenses by small business, in contravention to Congress's mandate in § 309(j) of the FCA.

[15] On appeal to the district court, the FCC presented four arguments: (1) the subsidiary debtors and GWI PCS had incurred a binding obligation to pay the bid price for the licenses on May 8, 1996, the date the auction closed; (2) permitting the subsidiary debtors to retain the licenses without complying fully with the terms of the bid would unlawfully alter the terms for C-block license ownership established by FCC regulations; (3) the bankruptcy court erred in extinguishing, rather than subordinating, the FCC's claim in excess of \$166 million; and (4) the bankruptcy court erred in its valuation of the licenses on January 27, 1997 at \$166 million. Notably, the FCC did not appeal the bankruptcy court's determination that the debtor entities should not be collapsed or treated as one entity under an alter ego theory.

Over the FCC's objection, the bankruptcy court proceeded to confirm a plan of reorganization, which incorporated its prior ruling that avoided $894 million of the subsidiary debtors' and GWI PCS's obligation to the FCC and enjoined the FCC from taking any action to revoke the fourteen licenses[16]. The reorganization plan contained two possible outcomes of the reorganization effort. The first option, labeled the "Business Alternative," provided for the Debtors raising money in the financial markets and continuing with their original plan to offer wireless communications services. In the event the Business Alternative failed, the plan also provided for a "Litigation Alternative," under which the Debtors would return the fourteen licenses to the FCC and pursue litigation against the FCC to recover the $106 million down-payment for the licenses, which would then be distributed among the Debtors' creditors. On September 10, 1998, the bankruptcy court, pursuant to 11 U.S.C. § 1129, entered an order confirming the plan of reorganization. Under the reorganization plan, the subsidiary debtors and GWI PCS were obligated to pay the FCC $60 million at a six-and-one-half per cent rate of interest; this $60 million obligation was secured by the licenses. The bankruptcy court also modified the reorganization plan to preserve certain issues raised in the appeal of the avoidance

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[16] The confirmation order, in relevant part, states as follows:

> "[It is further] ORDERED that on and after the Effective Date, the FCC shall be and hereby is enjoined from taking any action whatsoever against the Debtors to revoke their PCS licenses in connection with any claim, transaction or occurrence which arose prior to the Effective Date. . . ."

judgment.[17] In short, if a reviewing court did not affirm the avoidance judgment and determined that the bankruptcy court's valuation of the licenses was incorrect, the FCC would receive an increased secured claim equal to the lesser of (1) the amount determined by final judgment, or (2) the average price produced at the FCC's reauction of C-block licenses scheduled for March 1999[18]. If the amount of the FCC's claim deter-

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[17] In the confirmation order, the bankruptcy court provided that:

> "[It is further] ORDERED that in the event the Avoidance Judgment is not finally affirmed on appeal, and the appellate process results in a judgment producing a claim for the FCC in an amount in excess of $60 million, the FCC's secured claim, for purposes of the Plan and treatment thereunder, shall be increased from $60 million to the lesser of (i) the amount of the claim produced by the final judgment or (ii) the amount of the claim produced by the average price per pop bought at the FCC re-auction of C Block licenses in March 1999 multiplied by the number of the pops covered by the Debtors' licenses; and it is further
>
> [ ] ORDERED that if the amount of the FCC's claim as determined on appeal is greater than the value established at the reauction, the FCC shall have an unsecured claim against the Debtors for the difference between the amount determined by the reauction and the amount determined on appeal, payable on a pro rata basis from the Unsecured Creditors' Fund with all other Unsecured Claims."

The reorganization plan did not provide for an unsecured claim for the FCC, but did establish a creditors' fund of $18 million for the payment of all unsecured claims in the event that the avoidance judgment was reversed or modified on appeal, thus keeping available funds if the FCC became entitled to an unsecured claim.

[18] The reauction began on March 23, 1999 and concluded on April 20, 1999. The average bid price per pop of a C-block license bought at the reauction was $3.88. As the subsidiary debtors' 14 licenses cover approximately 17.9 million pops, the amount of the

mined on appeal was greater than the price at the reauction, the FCC's claim would be bifurcated under 11 U.S.C. §§ 502 & 506, with the FCC receiving an additional unsecured claim for the difference between the amount determined at the reauction and the amount determined on appeal, payable out of the creditors' fund (see note 17, *supra*) on a pro rata basis with other unsecured creditors. In preserving the FCC's appellate rights, the bankruptcy court sought to provide a fair and equitable means for the FCC to protect its interest in the licenses without unduly hindering the Business Alternative and the Debtors' ability to finance and implement the reorganization plan.

The FCC appealed the confirmation order to the district court. The district court, having appellate jurisdiction under 28 U.S.C. § 158(a)[19], consolidated the

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claim produced by the average price per pop bought at the FCC reauction of the C-block licenses multiplied by the number of the pops covered by the subsidiary debtors' licenses would total approximately $69,452,000.

[19] 28 U.S.C. § 158(a) provides as follows:

> "(a) The district courts of the United States shall have jurisdiction to hear appeals[ ]
>
> (1) from final judgments, orders, and decrees;
>
> (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
>
> (3) with leave of the court, from other interlocutory orders and decrees;
>
> and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only

FCC's appeal of the confirmation order and its appeal of the avoidance judgment. The FCC also sought a stay of both the adversary judgment and the confirmation order of the bankruptcy court. The district court entered a temporary stay on September 10, 1998, which expired by its terms on September 30, 1998. On September 30, 1998, the then-Chief Judge of this Court issued a stay "to preserve the status quo and jurisdiction until . . . this court ha[s] an appropriate opportunity to determine whether to stay the Avoidance Decision and the Confirmation Decision until appeals therefrom are finally resolved." *In re United States*, No. 98-11123 (5th Cir. Sept. 30, 1998) (unpublished). This stay was lifted by this Court on October 7, 1998. *In re United States*, No. 98-11123 (5th Cir. Oct. 7, 1998) (*per curiam*) (unpublished). No further stay was secured by the FCC.

While the FCC's consolidated appeals remained pending in the district court, the Debtors proceeded, in the absence of a stay, to perform some of the transactions set forth in the Business Alternative. On October 29, 1998, the Debtors moved to dismiss the entirety of the FCC's appeal of the confirmation order and partially dismiss the FCC's appeal of the avoidance judgment, because the reorganization plan had been substantially consummated.[20] The FCC opposed the

to the district court for the judicial district in which the bankruptcy judge is serving."

[20] The Debtors listed the following financial transaction as having been conducted: (1) equity investors having provided approximately $5.1 million in funding to the Debtors; (2) equity investors having signed notes with a face value of approximately $5.1 million payable to the Debtors and the Debtors having drawn upon $4.4 million of these funds; (3) Lucent Technologies having funded $30 million to the Debtors; (4) a $28 million payment by the

motion to dismiss its appeal, and when the district court had not ruled on the FCC's appeals nearly ten months later, the Debtors sought a writ of mandamus from this Court directing the district court to issue a decision. The mandamus petition was denied when the district court indicated that it would rule by September 30, 1999. *In re GWI PCS 1, Inc.*, No. 99-10923 (5th Cir. Aug. 25, 1999) (unpublished).

Debtors to Hyundai Electronics of America; (5) the Debtors' funding their contemplated professional fees; (6) the retention of Prudential Securities, Inc., as a financial advisor and lead manager of the Debtors' high yield debt offering, including a $150,000 non-refundable retainer paid to Prudential; (7) paying an initial distribution to unsecured creditors holding allowed claims; (8) paying the majority of the Debtors' remaining administrative expenses; (9) the Debtors' issuing $5 million in preferred stock; (10) the subsidiary debtors signing new notes and security agreements in favor of the FCC; (11) the Debtors' payment to the FCC of the first installment on the licenses, approximately $2 million; (12) payment of the Debtors' regular operating expenses, including payroll, payroll taxes, property and equipment lease payments, and other normal operating business expenses; (13) a $1.6 million payment from to the Debtors to Lucent Technologies in commitment fees on credit facilities provided by Lucent; (14) the Debtors' entering into binding contracts by executing purchase orders to acquire $3 million of fast start services to design and construct their wireless network; (15) the Debtors, with the assistance of Lucent Technologies, having begun implementation of the design plans for their network and the purchase of sophisticated equipment for use therein; (16) the employment of Arthur Anderson to perform audit services for the years 1997 and 1998; (17) the Debtors having incurred other post-consummation fees in excess of $150,000 in connection with the preparation of the offering memorandum; and (18) the filing of UCC-1 financial statements with the Secretary of State of Texas on behalf of Lucent Technologies. Before the district court, the FCC did not dispute that these transactions had occurred.

On September 27, 1999, the district court issued a decision, concluding that the Debtors had substantially consummated the plan of reorganization under the Business Alternative[21] and dismissing as equitably moot the FCC's appeal of the confirmation order and part of the FCC's appeal from the avoidance judgment. *See United States v. GWI PCS 1, Inc.*, 245 B.R. 59, 64 (N.D. Tex. 1999). Without identifying the portions of the avoidance appeal that remained before it, the district court held simply that "the court denies the United States' remaining claims with respect to the Avoidance Judgment." *Id.* On September 30, 1999, the district court entered judgment "in accordance with the court's order of September 27, 1999", affirming the bankruptcy court's orders.[22] The FCC timely appealed to this Court.

Discussion

The FCC asserts that the district court erred in three respects: (1) dismissing portions of its appeal under the doctrine of equitable mootness; (2) affirming the bankruptcy court's avoidance judgment, despite its effect on the regulatory authority of the FCC over the licenses; and (3) affirming the bankruptcy court's

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21 In fact, the bankruptcy court had closed the Debtors' bankruptcy estates in July 1999, finding them to have been fully administered.

22 The Debtors had cross-appealed the confirmation order to the district court, arguing that the bankruptcy court's requiring the Debtors to reserve funds when the FCC's claim was disallowed and determining that the FCC had an impaired claim due solely to the pendency of the appeal of the avoidance judgment were erroneous. *See id.* at 64-65. The district court denied the Debtors' claims, *see id.* at 65, and the Debtors do not renew these contentions on appeal to this Court.

decision that the subsidiary debtors' and GWI PCS's obligation to the FCC was an avoidable transfer. We will first address equitable mootness and then turn to the FCC's remaining arguments that are not equitably moot.

I Equitable Mootness

At the outset, the parties disagree as to the standard of review this Court should apply when examining a district court's dismissal of an appeal as equitably moot. The FCC argues that, although the fact findings by the district court should be accepted unless clearly erroneous, the ultimate decision that an appeal is equitably moot remains a legal determination to be reviewed *de novo*. Conversely, the Debtors contend that we should review the district court's dismissal of the FCC's appeal for abuse of discretion—the standard employed by the Third and D.C. Circuits. *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (*en banc*); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986). In *In re Berryman Products, Inc.*, 159 F.3d 941 (5th Cir. 1998), we affirmed the district court's dismissing as moot a challenge to the confirmation of a reorganization plan of a chapter 11 debtor. *See id.* at 946. We prefaced our discussion of whether the challenge was moot with the following statement regarding our standard of review: "In the bankruptcy appellate process, we perform the same function as did the district court: Fact findings of the bankruptcy court are reviewed under a clearly erroneous standard and issues of law are reviewed *de novo*." *Id.* at 943 (footnote omitted); *see In re Manges*, 29 F.3d 1034, 1038-44 (5th Cir. 1994) (undertaking an independent review of the district court's dismissal of the debtors' appeal of the confirmation order).[23] Accordingly, we agree with the FCC and will employ this standard in reviewing the district court's ruling on equitable mootness in the case *sub judice* as well.

Equitable mootness "is not an Article III inquiry as to whether a live controversy is presented; rather, it is a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions." *In re Manges*, 29 F.3d at 1038-39 (citation omitted). "Consequently, a reviewing court may decline to consider the merits of a confirmation order when there has been substantial consummation of the plan such that effective judicial relief is no longer available—even though there may still be a viable dispute between the parties on appeal." *Id.* at 1039 (citations omitted). When evaluating whether an appeal of a reorganization plan in a bankruptcy case is moot, this Court examines whether (1) a stay has been obtained, (2) the plan has been substantially consummated, and (3) the relief requested would affect either the rights of parties not before the court or the success of the plan. *See In re U.S. Brass Corp.*, 169 F.3d 957, 959 (5th Cir. 1999) (citing *In re Berryman Prods.*, 159 F.3d at 944; *In re Manges*, 29 F.3d at 1039).[24] We consider each in turn.

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[23] The Second and Eleventh Circuits have also adopted this standard. *See In re Burger Boys, Inc.*, 94 F.3d 755, 759 (2d Cir. 1996); *In re Club Assoc.*, 956 F.2d 1065, 1069 (11th Cir. 1992). *See also In re Western Pac. Airlines, Inc.*, 181 F.3d 1191, 1194 (10th Cir. 1999); *In re Filtercorp, Inc.*, 163 F.3d 570, 576 (9th Cir. 1998) (both reviewing mootness *de novo*).

[24] As we stated in *Manges:*

> " 'The test for mootness reflects a court's concern for striking the proper balance between the equitable considerations of

A. Failure to Obtain a Stay

The first question in a mootness inquiry is whether the FCC secured a stay to prevent execution of the reorganization plan. "[T]he requirement of a stay encapsulates the fundamental bankruptcy policy of reliance on the finality of confirmation orders by the bankruptcy court." *In re Berryman Prods.*, 159 F.3d at 944 (footnote and citations omitted).[25] Although the FCC secured a temporary stay from the district court on September 10, 1998 and from this Court on September 30, 1998, the stay was lifted on October 7, 1998 and no further stays were effectuated.

The FCC argues that "third parties are well aware of the government's position that licensees such as GWI

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finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy order adversely affecting him.'" *In re Manges*, 29 F.3d at 1039 (quoting *In re Club Assoc.*, 956 F.2d at 1069).

The Eleventh Circuit considers an additional factor-whether the relief sought would affect the reemergence of the debtor as a revitalized entity. *See In re Club Assoc.*, 956 F.2d at 1069 n. 11.

[25] The Seventh Circuit has explained that:

"The significance of an application for a stay lies in the opportunity it affords to hold things in stasis, to prevent reliance upon the plan of reorganization while the appeal proceeds. A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization. And it is the reliance interests engendered by the plan, coupled with the difficulty of reversing critical transactions, that counsels against attempts to unwind things on appeal. Every incremental risk of revision of appeal puts a cloud over the plan of reorganization, and derivatively over the assets of the reorganized firm." *In re UNR Indus.*, 20 F.3d 766, 769-70 (7th Cir. 1994) (quoted in *In re Manges*, 29 F.3d at 1040).

are not entitled to retain licenses without paying the full amount of the winning auction bid. Investors' knowledge of that position, as well as the pendency of this appeal, appears to have had the same effect as a stay." This contention, however, has no bearing on whether a stay has or has not been obtained; rather, this point instructs our determination of whether the reorganization plan has been substantially consummated and the effect on parties not before the court—the second and third factors in our equitable mootness analysis—and cannot serve as a proxy for a judicial stay of the reorganization plan. In the absence of a stay, the reorganization plan became effective and has been implemented since October 7, 1997. This factor therefore militates in favor of dismissal for mootness.

B. Substantial Consummation of the Reorganization Plan

The second consideration in the mootness inquiry is whether the reorganization plan has been substantially consummated. We have adopted the "'substantial consummation' yardstick because it informs our judgment as to when finality concerns and the reliance interests of third parties upon the plan as effectuated have become paramount to a resolution of the dispute between the parties on appeal." *In re Manges*, 29 F.3d at 1041 (citations omitted). According to 11 U.S.C. § 1101(2):

> "'[S]ubstantial consummation' means—
>
> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the

management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan."

The FCC and the Debtors dispute whether the reorganization plan has been substantially consummated. The Debtors reiterate on appeal the numerous transactions completed following the confirmation of the reorganization plan, *see supra* note 20, that persuaded the district court to "conclude[ ] that the reorganization plan ha[d] been substantially consummated because substantially all of the property proposed by the plan to be transferred has been transferred, Debtors are managing substantially all of the property dealt with by the plan, and distribution under the plan has commenced." *GWI PCS 1, Inc.*, 245 B.R. at 63. Although the FCC does not contest that these transactions have occurred, the FCC maintains that they do not satisfy the "substantially consummated" standard for three reasons: (1) only "insiders", *i.e.*, plan participants, have provided funding for the Debtors in the reorganization and have been paid funds in the reorganization and thus lack a good faith expectation that the FCC's appeal would not be successful; (2) the Debtors have not obtained the $250 million in financing set forth in the reorganization plan and thus have been unable to create a wireless communications system; and (3) the "Litigation Alternative" in the reorganization plan contemplated ongoing litigation between the FCC and the Debtors, thereby not making return of licenses to the FCC and consummation of the plan mutually exclusive. We disagree with the FCC and conclude that the reorganization plan has been substantially consummated.

First, the FCC's argument that only "insiders" have provided financing to the Debtors and have received payments from the Debtors and therefore lack good faith reliance on the reorganization plan, even if true, has never been a consideration in determining whether a reorganization has been substantially consummated. *See In re Continental Airlines*, 91 F.3d at 565 ("While we agree that reliance of the Investors and others on the unstayed Confirmation Order is of central importance to our [equitable mootness] analysis, to focus on the 'reasonableness' of that reliance, at least as measured by the likelihood of reversal on appeal, is necessarily a circular enterprise and therefore of little utility. . . . Our inquiry should not be about the 'reasonableness' of the Investors' reliance or the probability of either party succeeding on appeal."); *cf. In re Sullivan Cent. Plaza, I, Ltd.*, 914 F.2d 731, 734-35 (5th Cir. 1990) (refusing to consider the alleged lack of good faith by a purchaser of debtor property in determining whether an appeal was moot under 11 U.S.C. § 363(m)).[26] Moreover, it would be natural for many, if not a majority, of the transactions set forth in a reorganization plan to involve the participants of the chapter 11 proceedings. Therefore, this argument fails.

Second, the FCC contends that the Debtors have yet to obtain all the financing required under the reorganization plan and have neither constructed nor made operable a personal communications system. The Debtors respond that, although additional financing is required for the completion of the personal communications system, the effectiveness of the reorganization plan does not necessarily depend on obtaining such

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[26] This is not to deny the relevance of such matters to the issue of whether or not a stay should be granted in the first place.

financing. We agree. Our standard requires only "substantial consummation," not absolute or complete consummation. The Debtors' failure to acquire full financing does not take away from the transactions that have been completed, *see supra* note 20. Accordingly, this argument does not mandate a conclusion that substantial consummation has not been achieved.

Third, the FCC maintains that, despite the transactions that have occurred, the contemplation of the return of the licenses to the FCC in the Litigation Alternative precludes a finding of substantial consummation. As the Debtors point out, however, no steps have been taken towards the Litigation Alternative; instead, it has been eschewed in favor of the Business Alternative with a number of transactions having been completed in furtherance of the Business Alternative. More importantly, the reorganization plan's provision of the Litigation Alternative bears more upon the effect of allowing the FCC's appeal to be considered on third parties, not on whether the reorganization plan, as implemented through the Business Alternative, has been substantially consummated. Therefore, we agree with the Debtors and the district court[27] that sub-

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[27] On this point, the district court ruled as follows:

"Although the United States agrees that these transactions have taken place, it does not believe that they constitute substantial consummation. The court disagrees. Upon review of the pleadings filed and the appellate record, the court concludes that the reorganization plan has been substantially consummated because substantially all of the property proposed by the plan to be transferred has been transferred, [the] Debtors are managing substantially all of the property dealt with by the plan, and distribution under the plan has commenced. The United States also disputes substantial consummation because the Litigation Alternative exists as a stantial consummation has been achieved; therefore, this factor weighs in favor of dismissal.

C. Effect on Parties Not Before the Court

The final question in the mootness inquiry involves whether the requested relief would affect the rights of parties not before the court or the success of the reorganization plan. *See In re Berryman Prods., Inc.*, 159 F.3d at 945-46. As we stated in *Manges*, "'[s]ubstantial consummation of a reorganization plan is a momentous event, but it does not necessarily make it impossible or inequitable for an appellate court to grant effective relief.'" *In re Manges*, 29 F.3d at 1042-43 (quoting *In re Chateaugay Corp.*, 10 F.3d 944, 952 (2d Cir. 1993)) (alteration in original). Here, we must evaluate the transactions that have occurred under the reorganization plan against the backdrop of the relief sought by the FCC—reinstatement of the full $954 obligation under the notes and bid price and the increased risk of revocation of the licenses for failure to satisfy the increased obligation. Despite the inclusion of the Litigation Alternative in the reorganization plan, it remains obvious that saddling the subsidiary debtors with an additional $894 million obligation would have a

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part of the confirmed reorganization plan. Again, the court disagrees. As discussed above, the court concludes that substantial consummation of the plan, by way of the Business Alternative, has already taken place irrespective of the possibility of implementation of the Litigation Alternative whereby the licenses would be returned to the FCC, and litigation for the benefit of the creditors and equity would be initiated to attempt to recover the payments made by [the] Debtors to the FCC. Accordingly, the second factor also weighs in favor of dismissal of the appeal as moot." *GWI PCS 1, Inc.*, 245 B.R. at 63-64.

detrimental affect on the post-bankruptcy investors and entities and on the success of the Business Alternative, which was the route preferred by the majority of the bankruptcy participants in resolving the Debtors' chapter 11 petition. In sum, it appears quite unlikely that we could place the Debtors' estates or the third parties back into the status quo as it existed before the avoidance judgment if we were to unravel this important and fundamental aspect of the reorganization plan at this time. Therefore, we conclude that this factor also weighs heavily in favor of mooting the FCC's appeal.[28]

D. Application of Equitable Mootness to the FCC's Arguments

As all three factors weigh in favor of the district court's dismissal of part of the FCC's appeal, we hold that the district court properly granted the Debtors' motion to dismiss. Having concluded that equitable mootness applies, we now turn to what it applies to. As the FCC properly concedes that its challenge to the

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[28] In its consideration of this factor, the district court stated as follows:

> "[T]he court must determine whether the granting of relief on appeal would affect the rights of third parties not before the court or the success of the plan. Upon review of the pleadings filed and the appellate record, the court concludes that the granting of the relief which the United States seeks on appeal would affect the rights of third parties not before the court and the success of the plan. The various investors and entities which have consummated transactions with Debtors since the entry of the Confirmation Order, and the confirmation plan itself, would be detrimentally affected if [the] Debtors were suddenly obligated to the FCC for an additional $900 million. The third factor, therefore, weighs in favor of dismissal of the appeal as moot." *GWI PCS 1, Inc.*, 245 B.R. at 64.

authority of the bankruptcy court to permit the subsidiary debtors to retain the licenses and the subsidiary debtors and GWI PCS to avoid $894 million of the subsidiary debtors' and GWI PCS's obligation to pay the full bid price for the licenses, does not amount to a contention that the bankruptcy court actually lacked *jurisdiction*, as such, to enter any portion or portions of the complained of orders,[29] we hold this challenge is

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[29] The bankruptcy court's enjoining the FCC from revoking the licenses and avoiding the majority of the obligations under the notes was within its jurisdiction to preserve property of the estate, *see* 11 U.S.C. § 541, and further the reorganization plan. In addition, 11 U.S.C. § 106 renders the United States and the FCC subject to the bankruptcy proceedings. Section 106 states as follows:

> "(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent

equitably moot. Although the bankruptcy court possibly *erred* in permitting avoidance and enjoining the FCC from revoking the subsidiary debtors' licenses for failing to remit the full bid price, thereby taking onto itself a quasi-regulatory function held by the FCC, the FCC's challenge on this point and request that the

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with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate." 11 U.S.C. § 106.

Moreover, 28 U.S.C. § 1334(b), which provides district courts with jurisdiction over all civil proceedings arising under title 11, or arising in or related to cases filed under title 11, "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts," and 28 U.S.C. § 157 grant the bankruptcy court jurisdiction to consider the Debtors' avoidance claims.

avoidance judgment, in its entirety, and the enjoinment order, be reversed are barred by equitable mootness.

The Second Circuit's decision, *In re Nextwave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999) (*per curiam*), *cert. denied*, —- U.S. —-, 121 S. Ct. 298, 148 L.Ed.2d 240 (2000), although casting doubt on the merits of the bankruptcy court's assuming a quasi-regulatory role, does not dissuade us from ruling that the FCC's challenge on this issue is equitably moot. NextWave Personal Communications, Inc. (NextWave), like GWI PCS, was the high bidder for C-block licenses at the FCC's 1995-96 C-block auction. *See id.* at 46. Similar to nearly all winning bidders for C-block licenses, NextWave experienced financial difficulties and on June 8, 1998 "filed a Chapter 11 petition and instituted an adversary proceeding against the FCC that sought to avoid the company's obligations resulting from its acquisition of the Licenses." *Id.* at 48. The bankruptcy court granted NextWave's relief in the adversary proceeding, finding that the transaction in which it had acquired the licenses was a fraudulent transfer subject to avoidance. *See id.* at 50. Accordingly, the bankruptcy court reduced NextWave's obligation to the FCC from $4.74 billion to $1.02 billion.[30] *See id*. The Second Circuit reversed the bankruptcy court's avoidance judgment, concluding that the bankruptcy court improperly "exercised the FCC's radio-licensing function." *Id.* at 55. In contrast to the present

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[30] As in the present case, the bankruptcy court valued the licenses as of the date the notes securing NextWave's obligation were executed, not on the closing date of the C-block auction. *See id.* at 49-50. The bankruptcy court also credited NextWave with its $474 million in down-payments, leaving approximately $549 million in payment left to be made to the FCC. *See id.* at 50.

case where the district court dismissed this claim by the FCC as equitably moot, the district court in *NextWave* had "affirmed [the avoidance judgment] for substantially the reasons stated by the bankruptcy court." *Id.* at 50 (citing *In re NextWave Personal Communications, Inc.*, 241 B.R. 311 (S.D.N.Y. 1999)). The district court in *NextWave* did not find the FCC's appeal to be equitably moot, nor did the Second Circuit consider that issue. In fact, the FCC had successfully obtained a stay in *NextWave* and NextWave did not have a confirmed reorganization plan to consummate. Accordingly, mootness was not at issue. Therefore, although the Second Circuit's decision supports the FCC's substantive merits argument, it does not prevent the FCC's challenge on this issue from being equitably moot.[31]

The reorganization order, however, preserved certain challenges to the valuation of the licenses and the amount of a the FCC's claim against the Debtors. In light of the results of the March 1999 reauction of C-block licenses, *see supra* note 18, the remedy now available to the FCC is necessarily limited to an unsecured claim for any amount the FCC's claim is determined on appeal to be in excess of the average winning bid at the March 1999 C-block reauction, *see supra* notes 17 and 18. At oral argument, counsel for the Debtors conceded that the reorganization plan preserved two grounds for the FCC to appeal: (1) the valuation of the licenses as of

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[31] Indeed, if the issue were not equitably moot, we might agree with the Second Circuit and reverse the bankruptcy court's avoidance judgment. However, that is not the case before us, and we need not and do not decide the matter. We observe that no party has urged before us the applicability, or otherwise, of 11 U.S.C. § 362(b)(4), or indeed even cited that section to us.

January 27, 1997; and (2) when the subsidiary debtors' and GWI PCS's obligation to the FCC arose. These challenges can not result in the revocation of the licenses, but rather only in the recoupment of more money by the FCC as an unsecured claim. We now turn to the FCC's contention that the bankruptcy court erred in avoiding $894 million of the subsidiary debtors' and GWI PCS's obligation to the FCC, keeping in mind that the avoidance judgment cannot now be vacated and the only remedy available to the FCC is an unsecured claim (payable only out of the $18 million Unsecured Creditors' Fund, see notes 17 and 18, *supra*).

II The Avoidance Judgment

The bankruptcy court avoided approximately $894 million of the subsidiary debtors' and GWI PCS's obligation to the FCC as a constructive fraudulent transfer under 11 U.S.C. § 548(a)(2) (1996)[32]. The elements of a claim of constructive fraud under section 548(a)(2) are that: (1) the debtor transferred an interest in property; (2) the transfer of that interest occurred within one year prior to the filing of the bankruptcy petition; (3) the debtor was insolvent on the date of the transfer or became insolvent as a result thereof; and (4) the debtor received less than reasonably equivalent value in exchange for such transfer. *See In re McConnell*, 934 F.2d 662, 664 (5th Cir. 1991); *see also In re XYZ Options*, *Inc.*, 154 F.3d 1262, 1275 (11th Cir. 1998); *Butler v. Lomas and Nettleton Co.*, 862 F.2d 1015, 1017 (3d Cir. 1988); *cf. Burroughs v. Fields*, 546 F.2d 215, 218 (7th Cir. 1976) (interpreting 11 U.S.C. § 107, the predecessor to 11 U.S.C. § 548). The FCC does not appeal the bankruptcy court's valuation of the licenses as of

[32] See note 11, *supra*.

January 27, 1997, or March 14, 1997, nor does the FCC contend that the subsidiary debtors or GWI PCS were solvent as of January 27, 1997 or March 14, 1997. Therefore, any such arguments have been waived. However, the FCC does contest the bankruptcy court's decision to choose January 27, 1997 (or March 14, 1997) as the appropriate date for the avoidance inquiry. The Debtors bear the burden of establishing the date the transfer occurred. *See In re McConnell*, 934 F.2d at 665 n. 1; *In re Morris Communications NC, Inc.*, 914 F.2d 458, 466 (4th Cir. 1990). The bankruptcy court's determination on this issue involves a mixed question of law and fact, which we review *de novo* (although findings of historic facts are accepted unless clearly erroneous). *See In re Southmark Corp.*, 62 F.3d 104, 106 (5th Cir. 1995) (citing *Barnhill v. Johnson*, 503 U.S. 393, 112 S. Ct. 1386, 1389, 118 L.Ed.2d 39 (1992)).

The date on which the payment obligation arose is crucial to whether this obligation is avoidable. First, if the subsidiary debtors and GWI PCS incurred the obligation at the close of the auction, May 8, 1996, then the value of the fourteen licenses would be $1.06 billion. And if the fair market value were $1.06 billion, then the consummation of the notes would not be a constructive fraudulent transfer. On the other hand, if their obligation first arose on or about the date on which the licenses were conditionally granted, January 27, 1997, or on March 14, 1997, then the $954 million obligation represented by the notes substantially exceeded the fair market value of the licenses. Second, if the obligation arose on May 8, 1996, then it would not have been incurred within one year of the filing of the Debtors' bankruptcy petitions and would therefore not have been avoidable. In support of its position that the obligation arose on the date the C-block auction closed, the FCC relies on the following: (1) its own interpretation of its regulations; (2) auction law principles; and (3) the Second Circuit's *Nextwave* decision, which relies on (1) and (2). In response, the subsidiary debtors and GWI PCS assert that the FCC's interpretation does not warrant deference and that the bankruptcy court correctly fixed January 27, 1997 as the appropriate date, because the FCC's own regulations provide that the licenses were not transferred and the full bid price incurred until January 27, 1997. We conclude that the bankruptcy court did not err in evaluating the transfer as of January 27, 1997.

We first address the FCC's argument that this Court should defer to the FCC's formal interpretation that under its regulations the binding obligation to pay the full bid price attaches "upon the acceptance of the high bid." *In re Applications for Assignment of Broadband Personal Communications Servs. Licenses For,* 14 F.C.C.R. 1126 ¶ 1, 1998 WL 889489 (Dec. 23, 1998)*; see In re C.H. PCS, Inc.*, 14 F.C.C.R. 4131 ¶ 3, 1999 WL 24950 (Jan. 22, 1999) ("[U]nder the Commission's rules, a winning bidder is obligated to pay the full amount of its winning bid. . . ."). Accordingly, under this interpretation, the obligation was incurred, in the present case, on May 8, 1996. In *Nextwave,* the Second Circuit afforded this interpretation considerable deference in ruling that NextWave's obligation arose at the close of the C-block auction, despite NextWave's contention that the FCC's status as a creditor and its self-interest precluded the court's deferring to the FCC's interpretation. *See In re Nextwave,* 200 F.3d at 57 ("Our ruling is based on the FCC's interpretation of its own regulations, to which courts owe deference . . . .")*;*

id. at 59 ("The financial benefits of the FCC's post hoc interpretation do not extinguish the courts' duty to give deference.").

We respectfully disagree with the Second Circuit's conclusion that courts should defer to the FCC's interpretation in this matter. The FCC did not announce its interpretation until December 23, 1998—nearly two years after C-block licensees began experiencing financial difficulties and after the Debtors had filed bankruptcy petitions, brought an adversary proceeding against the FCC, and obtained a judgment in the adversary proceeding on June 4, 1998.[33] Moreover, in a separate statement issued with the December 23, 1998 order, FCC Chairman William Kennard wrote that "some of the[ ] issues [addressed in this order] only emerge[d] as a result of the lessons learned during litigation." *In re Applications for Assignment of Broadband Personal Communications Servs. Licenses For,* Statement of Chairman William Kennard, 14 F.C.C.R. 1126, 1998 WL 889489 (Dec. 23, 1998). In fact, paragraph one of the December 23, 1998 order, which contains the interpretation the FCC argues that this Court should defer to, states that the newly adopted procedures for transferring licenses "was made in light of a recent bankruptcy court decision and arguments raised in other pending bankruptcy proceedings." *Id.* ¶ 1 (footnote omitted). This bankruptcy decision and proceedings, as noted in the margin of the order, were those of the lower courts in this dispute between the

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[33] The present litigation was not the only one pending in December 1998 that raised the issue of avoidance; for example, NextWave filed its chapter 11 petition and instituted its adversary proceeding against the FCC on June 8, 1998. *See In re Nextwave,* 200 F.3d at 48.

Debtors and the FCC. *See id.* ¶ 1 n. 3 (containing the following citation: "*See, e.g., In re GWI PCS 1, Inc., et al.*, Case Nos. 39739676 through 39739689 (Bankr. N.D. Tex.)*; GWI PCS 1, Inc. v. FCC*, Adv. No. 397-3492 (Bankr. N.D. Tex.) (appeal pending)"). In circumstances such as these, where an agency's interpretation occurs at such a time and in such as [*sic*] manner as to provide a convenient litigation position for the agency, we have declined to defer to the interpretation. *See Waste Control Specialists v. United States Dept. of Energy*, 141 F.3d 564, 567 (5th Cir. 1998) ("We will not give deference to [the Department of Energy]'s interpretation . . . . , because it had not enunciated its interpretation prior to the litigation.") (footnote and citations omitted)*; United States v. Food, 2,998 Cases*, 64 F.3d 984, 987 n. 5 (5th Cir. 1995) ("Because it appears that the FDA interpreted § 334 and § 381 at such a time and in such a manner so as to provide a convenient litigation position for this suit, we disagree and conclude that the FDA's position is not controlling.") (citation omitted); *Irving Indep. Sch. Dist. v. Packard Properties*, 970 F.2d 58, 64 (5th Cir. 1992) ("Discounting the FDIC interpretation is appropriate for another important reason. The FDIC's Legal Memorandum was issued during pending litigation.")*; see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S. Ct. 468, 474, 102 L.Ed.2d 493 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.")*; Nordell v. Heckler*, 749 F.2d 47, 48 (D.C. Cir. 1984) ("To carry much weight, however, the [agency] interpretation must be publicly articulated some time prior to the agency's embroilment in litigation over the disputed provision."). Accordingly, we do not afford the FCC's December 1998 interpretation deference in determining the appropriate date on which the subsidiary debtors' and GWI PCS's obligation to the FCC arose.

We now consider the FCC's argument that auction law supports its position that the transfer must be evaluated at the date the C-block auction closed—May 8, 1996. General principles of auction law provide a baseline rule that the close of an auction—the fall of the hammer—signals acceptance of the offer and creates a binding contract between the seller and the high bidder. *See Blossom v. Railroad Co.*, 70 U.S. (3 Wall.) 196, 206, 18 L.Ed. 43 (1865) ("[A]s soon as the hammer is struck down . . . the bargain is considered as concluded, and the seller has no right afterwards to accept a higher bid nor the buyer to withdraw from the contract.") (footnote and citations omitted); *Lawrence Paper Co. v. Rosen & Co.*, 939 F.2d 376, 378-79 (6th Cir. 1991) ("'The contract becomes complete only when the bid is accepted, this being ordinarily denoted by the fall of a hammer.'") (quoting 7 AM.JUR.2D *Auctions & Auctioneers* § 16 (1980 & Supp. 1991)); *Bottorff v. Ault*, 374 F.2d 832, 835 (7th Cir. 1967) ("The sales here were at auction. They were completed when the hammer fell or when the auctioneer said 'sold.'") (citation omitted); *United States v. Conrad*, 619 F. Supp. 1319, 1321 (M.D. Fla. 1985) ("It has long been settled that a bid constitutes an offer and the fall of the hammer signifies acceptance."). This postulate of auction law, however, merely provides a baseline, which, in the context of the FCC's auction of the electromagnetic spectrum, has been modified by the FCC's regulations. In *Nextwave*, the Second Circuit agreed with the FCC's interpretation of the bidding regulations, concluding that at the close of a C-block auction a winning bidder "became obligated, if qualified, to pay the . . . bid price or, if unqualified, to pay a prescribed penalty." *In re Nextwave*, 200 F.3d at 58. The Second Circuit then reasoned that, "[b]y making the high bid, NextWave (a) assumed an obligation to pay a down-payment promptly, (b) assumed an obligation to pay in the future the amount of its bid upon receipt of the Licenses and (c) assumed the risk that it might prove unqualified, by binding itself in that event to pay the amount of any shortfall in a re-auction of the same Licenses." *Id.* at 61. Thus, the Second Circuit determined that NextWave became obligated to pay the FCC the full bid price at the close of the auction. We respectfully disagree with the Second Circuit's conclusion in this respect.

Neither the FCA nor FCC regulations states that the high bidder for a C-block license becomes obligated for the full amount of the bid at the close of the auction. Instead, 47 C.F.R. § 24.704 provides as follows:

> "(a) When the Commission conducts a simultaneous multiple round auction pursuant to § 24.702(a)(1), the Commission will impose penalties on bidders who withdraw high bids during the course of an auction, who default on payments due after an auction closes, or who are disqualified.
>
> (1) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal penalty would be assessed if the subsequent winning bid exceeds the withdrawn bid. This penalty amount will be deducted from any upfront pay-

ments or down payments that the withdrawing bidder was [sic] deposited with the Commission.

> (2) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in paragraph (a)(1) of this section plus an additional penalty equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission." 47 C.F.R. § 24.704(a) (1995).[34]

This penalty provision does not obligate the winning bidder to pay the full amount of the bid. Accordingly, by making the winning bids on the fourteen licenses, GWI PCS only obligated itself to pay a penalty in the event of default or disqualification, not the full amount of the winning bids.[35] There has been no default

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[34] This regulation governing the auction of the electromagnetic spectrum comports with the FCC's general competitive bidding procedures contained in 47 C.F.R. §§ 1.2104(g) & 1.2109(c) (1995).

[35] The FCC's treatment of a defaulting entity further supports this conclusion. *See In re BDPCS, Inc.*, 11 F.C.C.R. 14399, 1996 WL 625565 (Oct. 28, 1996). BDPCS was a high bidder for seventeen C-block licenses, but "fail[ed] to remit the required down payment on the licenses for which it was the successful high bidder." *Id.* ¶ 1. On May 30, 1996, the FCC publicly announced that BDPCS had defaulted on the seventeen licenses and that these licenses would be reauctioned in July 1996. *See id.* ¶ 4. With regard to BDPCS's obligation to the FCC, the October 25, 1996 order states as follows:

respecting the fourteen licenses for which GWI PCS was the high bidder. No penalty therefore has been assessed or can be calculated.[36]

After the close of the auction on May 8, 1996, GWI PCS was merely entitled to apply for the licenses. To be sure, GWI PCS held a contingent right to the fourteen licenses; however, the FCC's January 27, 1997 order makes clear that the transfer of the licenses was not complete until the execution of the notes and the payment of the remaining portion of the down-

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> "A defaulting bidder is subject to certain default payment obligations. Specifically, such bidder is required to pay the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission (so long as the subsequent winning bid is less than the amount bid), plus an additional payment equal to three percent of the defaulter's bid or the subsequent winning bid, whichever is less. In the event that a license is reauctioned for amount greater than or equal to the defaulted bid, the total default payment is equal to three percent of the defaulted bid. In the event that the default payment cannot be determined (i.e, because a license has not yet been reauctioned), the Commission has indicated that a deposit may be assessed of up to 20 percent of the defaulted bid price. Finally, the Commission's payment rules provide that if a defaulting bidder does not submit the default payment assessed by the Commission in the time required, any amounts overdue 'will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission'." *Id.* ¶ 5 (footnotes omitted).

Notably, this order does not state that BDPCS is, or was ever, obligated to the FCC for the full amount of its bid price.

[36] In fact, the subsidiary debtors assert that, since the bankruptcy court confirmed the reorganization plan, they have made over $9 million in installment payments to the FCC under the modified obligation to the FCC—a contention the FCC does not dispute.

payment. *See Wireless Telecommunications Bureau Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block Licenses to GWI PCS Inc.*, 12 F.C.C.R. 1215, 1997 WL 28957 (Jan. 27, 1997) ("GWI PCS will receive its individual BTA licenses following payment for each license of the final down payment and execution and return of the note and security agreement."); *id.* ("[T]he Bureau . . . granted GWI PCS's applications, conditioned on timely payment of its remaining down payment obligation.").[37] GWI PCS's applications remained subject to objection by the public (and in fact were objected to) and could have been rejected by the FCC—a decision affording the FCC some level of discretion. *See* 47 C.F.R. § 24.832(a) (1995) ("Applications for an instrument of authorization will be granted if, upon examination of the application and upon consideration of such other matters as it may officially notice, *the Commission finds that the grant will serve the public interest, convenience and necessity.*") (emphasis added); 47 C.F.R. § 24.804(a) (1995) ("Authorizations will be granted upon proper application if: (1) The applicant is qualified under all applicable laws and Commission regulations, policies and decisions; (2) There are frequencies available to provide satisfactory service; and (3) *The public interest, convenience or necessity would be served by a grant.*") (emphasis added); *see also* 47 C.F.R. § 1.2108(d)(1) (1995) ("If the Commission determines that: (1) an applicant is qualified and there is no substantial and material issue of fact concerning that determination, it will grant the application."); *In re Implementation of*

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[37] In addition, interest on the bid amount did not begin to accrue until the conditional granting of the licenses. *See* 47 C.F.R. § 24.711(b)(1) (1995); 47 C.F.R. § 1.2110(e)(3)(i) (1995).

Section 309(j) of the Communications Act—Competitive Bidding, Fifth Report and Order, 9 F.C.C.R. 5532 ¶ 81, 1994 WL 372170 (July 15, 1994) ("If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, the license(s) will be granted to the auction winner.").[38] In addition, it is undisputed that while the applications were pending, GWI PCS could not and did not use the licenses. *See* 47 C.F.R. § 24.803 (1995) ("No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part."). Only after the applications were approved and the promissory notes had been signed, could the fruits of the licenses be utilized.[39] Accordingly, the C-block

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[38] The FCC also has the authority to amend the terms for awarding a license after an application for the license has been filed. *See PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1000-01 (D.C. Cir. 1999) (concluding that the FCC's decision to auction licenses and return all pending applications, which had been submitted when the licenses were awarded by a lottery system, was not arbitrary and capricious); *Mobile Communications Corp. of Am. v. FCC*, 77 F.3d 1399, 1402-03 (D.C. Cir. 1995) (upholding the FCC's authority to impose a payment requirement for a license, where the potential licensee applied for the license before the FCC required any payment).

[39] The FCC regulations, however, do provide for the temporary use of a license with FCC permission. 47 C.F.R. § 24.825 provides as follows:

> "(a) In circumstances requiring immediate or temporary use of facilities, request may be made for special temporary authority to install and/or operate new or modified equipment. Any such request may be submitted as an informal application in the manner set forth in § 24.805 and must contain full particulars as to the proposed operation including all facts sufficient to justify the temporary authority sought and the

public interest therein. No such request will be considered unless the request is received by the Commission at least 10 days prior to the date of proposed construction or operation or, where an extension is sought, at least 10 days prior to the expiration date of the existing temporary authorization. The Commission may accept a late-filed request upon due showing of sufficient reasons for the delay in submitting such request.

(b) Special temporary authorizations may be granted without regard to the 30-day public notice requirements of § 24.827(b) when:

(1) The authorization is for a period not to exceed 30 days and no application for regular operation is contemplated to be filed;

(2) The authorization is for a period not to exceed 60 days pending the filing of an application for such regular operation;

(3) The authorization is to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as previously authorized; or

(4) The authorization is made upon a finding that there are extraordinary circumstances requiring operation in the public interest and that delay in the institution of such service would seriously prejudice the public interest.

(c) Temporary authorizations of operation not to exceed 180 days may be granted under the standards of Section 309(f) of the Communications Act where extraordinary circumstances so require. Extensions of the temporary authorization for a period of 180 days each may also be granted, but the applicant bears a heavy burden to show that extraordinary circumstances warrant such an extension.

(d) In cases of emergency found by the Commission, involving danger to life or property or due to damage of equipment, or during a national emergency proclaimed by the president or declared by the Congress or during the conauction was not a typical auction. Under the C-block auction rules, the winning bidder is not entitled to the license until after receiving subsequent FCC approval and does not become obligated for the full bid price until the notes securing the full bid price are thereafter signed.

The transfer of subsidiary debtors' fourteen licenses and the concurrent obligation to pay the remaining bid price, $954 million, did not arise until the subsidiary debtors executed the promissory notes for the remainder of the bid price on January 27, 1996. *See In re Southmark Corp.*, 62 F.3d at 106 ("A debtor incurs a debt when he becomes legally obligated to pay it.") (citing *Sherman v. First City Bank (In re United Sciences of Am.)*, 893 F.2d 720, 724 (5th Cir. 1990)*; In re Emerald Oil Co.*, 695 F.2d 833, 837 (5th Cir. 1983)). Therefore, we conclude that the bankruptcy court properly determined January 27, 1997 as the appropriate date to evaluate the avoidance motion. With respect to

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tinuance of any war in which the United States is engaged and when such action is necessary for the national defense or safety or otherwise in furtherance of the war effort, or in cases of emergency where the Commission finds that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission will grant radio station authorizations and station licenses, or modifications or renewals thereof, during the emergency found by the Commission or during the continuance of any such national emergency or war, as special temporary licenses, only for the period of emergency or war requiring such action, without the filing of formal applications." 47 C.F.R. § 24.825 (1995).

We hold that the possibility of an FCC temporary grant of use of the license does not render the grant of a license to a high bidder unconditional.

this issue, the FCC's challenge fails, and we affirm the avoidance of the approximately $894 million of the obligation of the subsidiary debtors (and of any such obligation of GWI PCS) to the FCC.

CONCLUSION

For the reasons stated, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:98-CV-1704-L

UNITED STATES OF AMERICA, APPELLANT

v.

GWI PCS 1, INC., ET AL., APPELLEES

[Filed: Sept. 30, 1999]

JUDGMENT

In accordance with the court's order of September 27, 1999, the bankruptcy court's Avoidance Judgment and Confirmation Order are hereby **affirmed**, and all costs of appeal are taxed against the United States.

SIGNED AND ENTERED this 30th day of September, 1999.

NANCY DOHERTY, Clerk

/s/ DEBRA GRAVES
By: DEBRA GRAVES, Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:98-CV-1704L

UNITED STATES OF AMERICA, APPELLANT

v.

GWI PCS 1, INC., ET AL., APPELLEES

[Filed: Sept. 27, 1999]

ORDER

Before the court are the appeals of two rulings by the United States Bankruptcy Court, an order confirming the debtors' plan of reorganization ("Confirmation Order"), and a final judgment avoiding a portion of a claim by a creditor against the debtors ("Avoidance Judgment"). The United States of America, on behalf of the Federal Communications Commission ("FCC"), appeals both of the bankruptcy court's rulings. The debtors have filed a cross-appeal of a portion of the Confirmation Order. The appeals of the two orders have been consolidated into this single case, Civil Action No. 3:98-1704-L.

I. Factual and Procedural Background

GWI PCS, Inc. (GWI PCS) made the successful bid of over one billion dollars for air spectrum wireless telecommunication frequency licenses in an auction by the FCC in May of 1996. Upon being named a winning bidder, GWI PCS was required to bring its total down payments up to 5% of its bid amount, $53 million. At GWI's request, the FCC issued the licenses in the names of the 14 subsidiary debtors. The licenses were subsequently awarded to the 14 subsidiary debtors in January of 1997. By that time, the market value, and accordingly the value of the licenses, had declined precipitously. Nevertheless, Debtors then paid the required additional 5% of the bid amount, an additional $53 million, bringing their total payment to $106 million.

The subsidiary debtors, 14 GWI PCS, Inc. subsidiaries, filed for bankruptcy in October of 1997, and challenged their obligation to pay the bid price for the licenses as fraudulent conveyances, claiming that they had received less than the reasonably equivalent value and became insolvent because of such. In January of 1998, GWI PCS, Inc. and General Wireless, Inc. likewise filed for bankruptcy and joined the subsidiary debtors in bankruptcy.

On June 4, 1998, the Bankruptcy Court entered a final judgment on the subsidiary debtors' and GWI PCS, Inc.'s avoidance claims against the FCC which reduced their obligations to the United States to $60 million. The United States appeals that judgment and unsuccessfully attempted to stay the judgment. On September 10, 1998, the Bankruptcy Court entered its order confirming the plans of reorganization for

General Wireless, Inc., GWI PCS, Inc., and for the subsidiary debtors. The United States also appeals that order. The United States secured temporary stays of those decisions, expiring September 30, 1998, but were unsuccessful in securing lengthier stays. The United States appeals the Avoidance Judgment, which reduced its claim against the debtors by over $900 million, and the Confirmation Order. Debtors cross-appeal a portion of the Confirmation Order.

II. Debtors' Motion to Dismiss Appeals

On October 29, 1998, the debtors filed a motion, and brief in support thereof, to dismiss the appeal of the Confirmation Order and partially dismiss the appeal of the Avoidance Judgment. On November 12, 1998, the United States filed an opposition to the motion to dismiss. On November 30, 1998, the debtors filed their reply to the United States' opposition to the motion to dismiss. On January 22, 1999, with leave of the court, the United States filed its surreply in further support of its opposition to the motion to dismiss. The debtors seek to dismiss the appeal of the Confirmation Order and partially dismiss the appeal of the Avoidance Judgment because of equitable mootness. They argue that the failure of the United States to obtain a continuing stay has resulted in the implementation and substantial consummation of the debtors' plan. They state that numerous third parties have acted in reliance on the Avoidance Judgment and the Confirmation Order, payments have been made, settlements consummated, and obligations incurred.

Debtors also assert that dismissing the appeals as moot is in the public's interest because the public will benefit if they are allowed to reorganize and implement their business plan. Such will make low cost wireless service available to everyone in their markets, with bundles of air time minutes at prices which are not available today, thus providing service to parties for whom cellular service is not currently affordable.

The United States asserts that the doctrine of equitable mootness should not apply because Debtors do not have an operating business and there exists a litigation alternative plan. It also insists that the equities do not merit dismissal and that the significant issues raised by its appeal are compelling reasons to reach the merits thereof.

In evaluating whether the appeal of a reorganization plan in a bankruptcy case is moot, the court examines whether: 1) a stay has been obtained, 2) the plan has been substantially consummated, and 3) the relief requested would affect either the rights of parties not before the court or the success of the plan. *In re U.S. Brass Corp.*, 169 F.3d 957 (5th Cir. 1999); *In re Berryman Products, Inc.*, 159 F.3d 941, 944 (5th Cir. 1998); *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995).

The United States attempted to obtain a stay of the Avoidance Judgment and the Confirmation Order. On July 30, 1998, the United States filed a motion to stay the operation or enforcement of the Avoidance Judgment; however, on August 7, 1998, the district court denied the motion. After the Confirmation Order was entered on September 10, 1998, the United States immediately filed an emergency motion for a stay pending appeal from the bankruptcy court's orders avoiding FCC claims and confirming reorganization. A temporary stay was granted through September 30, 1998. On September 25, 1998, the United States filed a motion to extend the temporary stay. On September 30, 1998, the court denied the United States' motions for stay. The United States secured a stay from Chief Judge Politz of the Fifth Circuit Court of Appeals on September 30, 1998. On October 7, 1998, that stay was lifted by the Fifth Circuit, and the United States' emergency petition for stay pending resolution of appeals, which was treated as a writ of mandamus, was denied by the Fifth Circuit. Thus the United States vigorously sought to obtain a stay to prevent the reorganization plan from going into effect.

Vigorously, though unsuccessfully, seeking to obtain a stay of a confirmed reorganization plan is not equivalent to actually obtaining such a stay. "A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization." *In re Manges*, 29 F.3d at 1040, citing *In re UNR Industries*, 20 F.3d 766, 770 (7th Cir.), *cert. denied*, 513 U.S. 999 (1994). The failure or inability to obtain a stay pending appeal carries the risk that review may be precluded because of mootness. *Id.* The United States was unable to obtain a stay, beyond the temporary stay that expired on September 30, 1998.

The next question in the mootness inquiry is whether the reorganization plan has been substantially consummated. Pursuant to 11 U.S.C. § 1101(2), "substantial consummation" means:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

"'Substantial consummation' is a statutory measure for determining whether a reorganization plan may be amended or modified by the bankruptcy court." *In re Manges*, 29 F.3d at 1040. The court "may 'decline to consider the merits of confirmation when a plan has been so substantially consummated that effective judicial relief is no longer available—even though the parties may have a viable dispute on appeal.'" *In re U.S. Brass Corp.*, 169 F.3d at 960, quoting *In re Berryman Products, Inc.*, 159 F.3d at 944.

Debtors cite numerous extensive financial transactions that have been conducted based upon the reorganization plan since the Fifth Circuit denied the United States' request for a stay. These transactions include the following:

1. Equity investors have funded approximately $5.1 million into Debtors;

2. Equity investors have signed notes payable to Debtors with a face amount of approximately $5.1 million, and Debtors have drawn upon $4.4 million of those funds;

3. Lucent Technologies (Lucent) has funded $30 million into Debtors;

4. Debtors paid $28 million to Hyundai Electronics of America;

5. Debtors funded their contemplated professional fees;

6. Debtors paid $150,000 to retain Prudential Securities, Inc., as financial advisor and lead manager of their high yield debt offering;

7. Debtors paid unsecured creditors holding allowed claims their initial distribution;

8. Debtors paid the large majority of remaining administrative expenses;

9. Debtors issued $5 million in preferred stock;

10. The subsidiary debtors signed new notes and security agreements in favor of the FCC;

11. Debtors paid the FCC the first installment on the licenses, approximately $2 million;

12. Debtors have paid their regular operating expenses, including payroll, payroll taxes, property and equipment lease payments, and other normal operating expenses;

13. Debtors have paid $1.6 million to Lucent in commitment fees on the credit facilities provided by Lucent;

14. Debtors have entered binding contracts by executing purchase orders to acquire $3 million of fast start services to design and construct their wireless network;

15. With the assistance of Lucent, Debtors have begun implementation of the design plans for their network and have purchased sophisticated equipment for use therein;

16. Debtors have employed Arthur Andersen to perform audit services for 1997 and 1998, and have incurred over $40,000 for such services; and

17. Debtors have incurred other post-consummation liabilities, such as professional fees, in connection with the preparation of the offering memorandum of over $150,000.

Although the United States agrees that these transactions have taken place, it does not believe that they constitute substantial consummation. The court disagrees. Upon review of the pleadings filed and the appellate record, the court concludes that the reorganization plan has been substantially consummated because substantially all of the property proposed by the plan to be transferred has been transferred, Debtors are managing substantially all of the property dealt with by the plan, and distribution under the plan has commenced. The United States also disputes substantial consummation because the Litigation Alternative exists as a part of the confirmed reorganization plan. Again, the court disagrees. As discussed above, the court concludes that substantial consummation of the plan, by way of the Business Alternative, has already taken place irrespective of the possibility of implementation of the Litigation Alternative whereby the licenses would be returned to the FCC, and litigation for the benefit of creditors and equity would be initiated to attempt to recover the payments made by Debtors to the FCC. Accordingly, the second factor also weighs in favor of dismissal of the appeal as moot.

Finally, the court must determine whether the granting of relief on appeal would affect the rights of third parties not before the court or the success of the plan. Upon review of the pleadings filed and the appellate record, the court concludes that the granting of the relief which the United States seeks on appeal would affect the rights of third parties not before the court and the success of the plan. The various investors and entities which have consummated transactions with Debtors since the entry of the Confirmation Order, and the confirmation plan itself, would be detrimentally affected if Debtors were suddenly obligated to the FCC for an additional $900 million. The third factor, therefore, weighs in favor of dismissal of the appeal as moot.

For the reasons stated above, Debtors' motion to dismiss the United States' appeal of the Confirmation Order and partially dismiss the United States' appeal of the Avoidance Judgment is **granted**. Accordingly, the United States' appeal of the Confirmation Order is dismissed, and the United States' appeal of the Avoidance Judgment is dismissed to the extent requested by Debtors.

With respect to the remaining issues raised by the United States' appeal of the Avoidance Judgment, the bankruptcy court's findings of fact are examined under the clearly erroneous standard, while its legal determinations are reviewed under the de novo standard. *In re Sewell*, 180 F.3d 707, 710 (5th Cir. 1999). Based on these standards, after review of the pleadings, the appellate record, and the applicable authority, the court denies the United States' remaining claims with respect to the Avoidance Judgment. Accordingly, the bankruptcy court's Avoidance Judgment is in all things affirmed.

III. Debtors' Cross-appeal

Debtors have filed a cross-appeal of the bankruptcy court's Confirmation Order. The United States filed a motion to dismiss the cross-appeal as untimely. The United States filed its motion to dismiss Debtors' cross-appeal, alleging that the notice was untimely filed. Debtors filed a response to the motion. The United States did not file a reply to Debtors' response.

On the final due date for the filing of Debtors' notice of appeal, Debtors mistakenly submitted their notice of appeal to the clerk of the district court rather than to the clerk of the bankruptcy court. The next day, the notice of appeal was forwarded to the bankruptcy court's clerk and was stamped as filed that day, one day late.

Bankruptcy Rule 8002(a) states, in pertinent part, "If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted." Because Debtors' notice of appeal was received by the clerk of the district court on the last day for timely filing, it is deemed timely filed with the clerk of the bankruptcy court. Accordingly, the United States' motion to dismiss is **denied**.[*]

[*] That the United States did not file a reply to Debtors' response evidences to some extent a lack of its disagreement with the merits of Debtors' response. Moreover, in light of Rule 8002(a), the court questions the seriousness of the Government's motion to dismiss the cross-appeal.

Debtors' cross-appeal of the Confirmation Order complains of the bankruptcy court's modification of their plan of reorganization, requirement that Debtors reserve funds under the plan when the FCC's claim was disallowed, and determination that the FCC had an impaired claim due solely to the pendency of its appeal of the Avoidance Judgment. As stated previously, the bankruptcy court's findings of fact are examined under the clearly erroneous standard, while its legal determinations are reviewed under the de novo standard. *In re Sewell, supra.* Based on these standards, after review of Debtors' claims, the pleadings filed, the appellate record, and the applicable authority, the court denies Debtors' claims. Accordingly, the bankruptcy court's Confirmation Order is in all things affirmed.

IV. Conclusion

As stated above, the bankruptcy court's Avoidance Judgment and Confirmation Order are hereby **affirmed**, and all costs of appeal are taxed against the United States. The clerk is hereby directed to "prepare, sign and enter the judgment" pursuant to Bankruptcy Rule 8016(a).

It is so ordered this 27th day of **September**, 1999.

/s/ SAM A. LINDSAY
SAM A. LINDSAY
United States District Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CASE NO. 397-39676-SAF-11
(JOINTLY ADMINISTERED)

IN RE:
GWI PCS1, INC., ET AL., DEBTORS

ORDER REVISING BENCH RULING

Pursuant to the court's bench ruling on September 9, 1998, the court provided that it would review the transcript of the ruling and issue revisions, if necessary. The attached revision corrects several words and phrases. The corrected bench ruling is hereby declared the court's controlling bench ruling and paragraph E of the confirmation order shall be construed to refer to the court's bench ruling as revised and corrected pursuant to this order.

SO ORDERED.

Signed this 15th day of September, 1998.

/s/ STEVEN A. FELSENTHAL
STEVEN A. FELSENTHAL
United States Bankruptcy Judge

APPENDIX E

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BK. NO. 397-39676-SAF-11

IN RE:
GWI PCS, INC., ET AL., DEBTOR

[Filed: Sept. 15, 1998]

TRANSCRIPT OF PROCEEDINGS

(Court's Ruling via Telephone Conference Call)

BE IT REMEMBERED, that on the 9th day of September, the above styled and numbered cause came on for hearing before the HONORABLE STEVE FELSENTHAL, Bankruptcy Judge presiding at Dallas, Texas, and the following constitutes the transcript of such proceedings as hereinafter set forth:

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THE COURT: I'm going to give you this bench ruling on the confirmation of the plan of reorganization, as modified. I understand that it may be difficult to hear on the phone call. It may be difficult for the reporter to get this bench ruling in full. I understand, sometimes, I trail off or may not have a clear break between sentences, all of which is to say I'm going to reserve the opportunity to review the transcript and to revise this so that it's clear and unambiguous what the holdings are. But I don't want to delay the process. You may want the transcript before I've had a chance to review it, so I'll have no problem with the transcript being issued before I have a chance to review it, just so the parties understand that I may have to modify it and/or amend it if something didn't come across correctly.

So with that, this will be the court's bench ruling on the confirmation of the plan of reorganization, as modified, filed by the debtors, GWI, and its subsidiary debtors. In addition, this will also be the court's bench ruling on the motion of the United States for relief pending appeal of the judgment in the avoidance adversary proceeding and of an appeal, if any, of the confirmation order.

On June 4, 1998, the court entered a judgment in the adversary proceeding. The court found that the debtors' obligation to the government above $166 million on January 27, [3] 1997 was a fraudulent conveyance under 11 U.S.C. Section 548. The court avoided the amount of the obligation above $166 million.

After application of a down payment of $106 million, the court found that the aggregate obligation owed to the government was $60 million, and entered a judgment that the subsidiary debtors pay the FCC $60 million in accordance with the terms and conditions of the FCC notes. The United States filed a notice of appeal of that judgment and moved this court for relief pending appeal.

The bankruptcy court must address the motion for relief pending appeal before the party seeking relief may pursue its request in the district court. That's pursuant to Bankruptcy Rule 8005. This court assured the parties and the district court that it would provide a timely opportunity to seek that relief in the bankruptcy court.

The debtors' plan incorporates the judgment. The plan, if confirmed and not stayed, would become a binding contract on the parties, thereby, potentially mooting the appeal of the judgment. Thus, the United States has had to preserve its issues concerning the judgment in the confirmation record. The United States has represented that it will consider filing an appeal of the confirmation order to preserve its appeal of the judgment.

For reasons the court will articulate in this bench [4] ruling, the confirmation order need not be appealed to preserve appellate review of the Judgment. Nevertheless, the court requested and the parties agreed, in the interest of judicial economy, to proceed on the assumption that the government would appeal a confirmation order and would seek a stay of the effective date of the plan confirmed by a confirmation order pending appeal.

The court conducted the confirmation hearing on August 31, 1998, September 4, 1998 and September 8, 1998, with a portion of the day on September 8 devoted to appellate relief issues. The court is required by the Bankrutpcy Rules to make findings of fact and conclusions of law. The court may do so by a bench ruling, and the parties should understand that this is a bench ruling that constitutes the court's findings and conclusions.

I'll first take up confirmation. Confirmation of a plan of reorganization is a core matter over which this court has jurisdiction to enter a final order. The plan, as modified, complies with the Bankruptcy Code, as the court will more fully explain in these findings. General Wireless, Inc. and each of the subsidiary debtors, all corporations, are proper debtors under the Bankruptcy Code. The subsidiary debtors filed their petitions for relief under the Bankruptcy Code on October 20th, 1997, and GWI and GWI PCS, filed their petitions on January 26, 1998. The court has jurisdiction over the cases, which have been jointly administered. Venue is proper in this district.

[5] No trustee, examiner or committee has been appointed. The debtors have remained debtors-in-possession pursuant to Sections 1107 and 1108. The debtors are the plan proponents and are proper plan proponents under Section 1121(a) of the Bankruptcy Code.

After notice and a hearing, the court considered the adequacy of the disclosure statement at hearings commencing on July 16, 1998. On July 17, 1998, the court entered an order approving the disclosure statement. The debtors served the disclosure statement and the plan in accordance with the Bankruptcy Code. Notice is sufficient under the Bankruptcy Code and for due process.

Prior to the commencement of the confirmation hearing, the debtors filed a motion to modify the plan. The government moved to continue the confirmation hearing to review the modifications to the plan and the plan documents. The court declined to grant the continuance, but carried the request for further consideration as the hearing proceeded. The hearing was continued over several days with a several day interval between hearing dates. These intervals provided sufficient time for government review and consideration of the modifications. The modifications were fully explored in the hearings. The modifications are not material. They do not adversely affect any party in interest. No additional solicitation is required, pursuant to Bankruptcy Rule 3019. [6] The court grants the modification motion. The court considers the plan, as modified.

The classification of claims and interests under the plan, as modified, are consistent with Section 1122. The plan treats the government as unimpaired. The government objects to this provision of the plan. The government's proof of claim for approximately one billion dollars notwithstanding, the government's claim pursuant to the judgment of this court is $60 million secured by a security interest in the licenses.

Under Section 548, any obligation above $166 million by January 27, 1998, was avoided. The debtors had already paid the government $106 million. Thus, the government's secured claim is $60 million.

Under the Bankruptcy Code, the claim is analyzed as of the petition date. The claim on the petition date was thus $60 million secured. The subsidiary debtors' plan proposes to pay that claim in full pursuant to the terms of the FCC note. Payment in full pursuant to the parties' contract sounds like an unimpaired treatment.

But impairment is a technical term under the Code, requiring an expansive consideration by the court. The government has filed a one billion dollar proof of claim. The judgment that avoided most of that claim is on appeal in the United States District Court.

The government argues that FCC regulations issued pursuant [7] to Section 309 of the Communications Act require payment of the obligation incurred pursuant to the C block auction to keep the licenses. The avoidance judgment, however, sets the amount of the obligation, pursuant to the Bankruptcy Code, to be paid. With the appeal pending the court must treat the government as impaired.

The debtors have filed a motion under Section 506, but, in light of the judgment, that motion was then withdrawn. The government has not moved to establish an unsecured claim. The government does not assert it has an unsecured claim. But in arguments on the motion for relief pending appeal, the government recognized that an appellate decision might potentially result in a deficiency. The government asked the court to protect that possibility. The point here is that with the appeal pending, the court should view the claim as impaired, and will.

The GWI PCS guaranty has changed provisions of the parties' contract. The debtors have withdrawn that guaranty. The judgment, therefore, will govern in the GWI PCS case. The government argues that the litigation trust impaired its claim. The litigation trust becomes operative only if the debtors' business plan does not become effective. The trust only preserves a cause of action. A cause of action existing pre-petition, preserved in the plan, does not impair a claim. A cause of action existing pre-petition becomes property of a [8] bankruptcy estate, and may, pursuant to a plan, be transferred to an entity representing the bankruptcy estate. The preservation of the cause of action by confirmation of the plan pursuant to the Bankruptcy Code does not impair the government's claim.

The government also argues that the Lucent documents authorizes a security interest or a transfer of an interest in the licenses, not permitted by FCC regulations. The debtors have filed a motion to modify the plan and plan documents to cure that objection by harmonizing the plan and plan documents with respect to this issue with the regulation. The court grants the motion, thereby resolving that issue. The court appreciates the closeness of the impairment question. With the appeal pending, the government's claim should, however, be treated as impaired.

The government has informed the court that it would vote against the plan for each of the debtors, other than GWI, where it has no claim. The Justice Department requests that the court delay the confirmation hearing and require a revoting with the disclosure statement and plan declaring the government's claim impaired. The government has no basis to request this delay. The court may accord the government its vote against the plan without delaying the process. All other creditors support the plan. The government's request for a revoting is denied. The court is going to treat the government [9] as having voted against the plan. GWI and PCS and the subsidiary debtors' plan may only be confirmed if the provisions of Section 1129 are met with the government's class voting against the plan regarding the relevant debtor.

The plan provides for the same treatment for each claim or interest in a particular class in compliance with Section 1123(a)(4).

GWI has reached a settlement with Hyundai. Hyundai has agreed to its treatment. The Hyundai settlement is fair and reasonable. Under the plan, a litigation trust would be established, but dormant, pending further developments. As clarified by the record at the confirmation hearing, the litigation trust exists to recover $106 million down payment from the FCC if the business alternative of the plan cannot go effective.

As Mr. Spickler testified, if the debtors are using the licenses, they have no reason to recover the down payment as they would not be returning the licenses to the FCC. If the plan goes effective, the litigation trust would not be operative. To assure that there is no ambiguity or uncertainty regarding the litigation trust, the confirmation order shall provide that the trust may not become effective without leave of this court, after notice and hearing.

Before leaving the trust issue, the court must observe that with regard to relief pending appeal, that should the FCC [10] decide to pursue litigation regarding the judgment, the debtors retake control of the rights of an apellee on appeal, including the right to request appropriate relief in the appellate court.

The plan provides an adequate means for its implementation. The debtors have requested that the court approve the plan documents. To the extent that the debtors request that the court thereby approve all the terms and conditions and provisions of each of the documents, that is an overly broad request. The documents constitute an adequate and appropriate means to implement the plan. The documents are substantially consistent with the plan. The court will, therefore, authorize the debtors to execute and implement the documents, provided, however, that the confirmation order shall provide that to the extent that the documents or the plan are inconsistent with the confirmation order, the confirmation order shall govern, and any disputes regarding consistency shall be determined by the court.

The plan provides for the officers and directors of the debtors and the trustee of the litigation trust. The debtors filed a notice regarding assumption of executory contracts, served on all affected parties. The debtors are not in default under any of those contracts or leases.

The debtors, as plan proponents, have complied with the Bankruptcy Code. The plan has been proposed in good faith and not by any means forbidden by law. The government complains [11] that the plan cannot be confirmed based on the avoidance judgment. The government further complains that the plan cannot be confirmed because the avoidance judgment should be stayed pending appeal. While protections pending appeal may be appropriately addressed as part of a confirmation order under Section 1129 of the Bankruptcy Code, no provision of the Bankruptcy Code prohibits a plan that incorporates an avoidance judgment. The argument lacks a common sense understanding of the Code. Congress would not provide for judgments under Chapter 5 that could not be used in plans under Chapter 11. The government must recall the decade-old teachings of the Supreme Court in the Timbers case, that the reading of the Code is a holistic endeavor, with each of its provisions to be read as part of and consistently with the whole.

No provision of the Communications Act prohibits the plan. As the court will explain later, the plan fulfills the express public policy legislated by the Congress in Section 309 of the Communications Act, even if the route taken to fulfill that policy is different than the FCC desires.

The notes to be executed pursuant to the plan, with the security agreement, include the dollar amount of the obligations of the government pursuant to the avoidance judgment. No other term or condition of the note is altered. The regulatory requirement that the debtors pay the obligation to retain the licenses is not altered. The amount of the [12] obligation established by the judgment must be paid to retain the licenses. No other regulatory provision is affected or altered by this plan.

To paraphrase the court's ruling in the adversary proceeding, the FCC's 10-gallon regulatory hat remains firmly on its crown. Only the FCC's banker's bowler has been adjusted. Indeed, both Mr. Spickler and Mr. Linquist testified that the plan intends to comply with the applicable regulations of the FCC. The plan, thus, only addresses the debtor/creditor relationship between the parties. The government's objection in this regard is overruled. The court will address protections for the parties pending appeal of the avoidance judgment later.

The plan complies with Section 1129(a)(4), (a)(5) and (a)(6). The plan complies with Section 1129 (a)(7). Each holder of an unsecured claim has accepted the plan. The government has not accepted its treatment in the plan. The government objects that the debtors have failed to establish the requirement of Section 1129(1)(7).

The government contends that with the value under the avoidance judgment, the hypothetical Chapter 7 trustee could sell the licenses for $166 million, pay the creditors and administrative expense claimants in full, and, even with interest. The court must construct a hypothetical Chapter 7 case based on the likely status of this case if converted to [13] Chapter 7 today.

As the government recognized during the confirmation hearing, a Chapter 7 trustee could not sell the licenses without FCC regulatory approval. The FCC would have to determine whether the transferee met the designated entity definition. The FCC would also contest the price of a sale if the appeal of the adversary proceeding judgment had not been decided.

In other words, the trustee could not sell the licenses for $166 million today because of the appeal of the judgment. The government has decided it must pursue the appeal. So a Chapter 7 trustee could not sell the licenses until litigation is resolved in the future.

However, assuming the government withdrew its appeal and consented to a sale under Section 363 of the Bankruptcy Code, if the trustee sold the licenses for $166 million, the following would happen. Sixty million would go to pay the FCC. Maybe another million or so would be necessary to pay for Chapter 7 administration. Three hundred thousand would go to pay the DIP loan. Chapter 11 administrative expenses would be paid. Five to $6 million would go to the unsecured creditors, it all the claims were allowed. Funds would be upstreamed. Somewhere over $50 million would go to Hyundai to pay its claim. The rest would go to equity. For all those parties, that might be a better result.

[14] However, the government contends it should receive all the funds after unsecured creditors are paid. But it has no allowed unsecured claim. So the court has to come full circle. The court's right back where it started. The government would not withdraw its appeal, then the trustee would face litigation.

The court lacked any evidence to construct a hypothetical Chapter 7 case based on an assumption that the government would withdraw its appeal of the judgment. Chapter 7 alternative is a litigation alternative.

Indeed, the trustee would be hard pressed to do anything other than abandon the licenses and pursue the return of the $106 million, which the government would vigorously contest, or keep the licenses protected by the automatic stay, and proceed with the litigation.

The estates only have $13,000 worth of other assets, which would cost the trustee about a third to administer and liquidate, leaving about $9,000. That $9,000 would be quickly exhausted by the litigation. If, on the other hand, the trustee returned the licenses, he could use the $9,000 to pay administrative expenses pro rata, leaving nothing for unsecured creditors.

Maybe the trustee could convince an attorney to take a cause of action against the government for a return of the $106 million on a contingency fee arrangement. But Hyundai has not [15] agreed to fund litigation outside the plan. The government strenuously argues that it should not return the down payment. The trustee would already be burdened by this court's judgment regarding restitution relief. The record lacks any evidence that a trustee could retain counsel on a contingency fee arrangement under these circumstances.

In the plan, administrative expenses are paid in full or in a manner acceptable to the claimants. The unsecured creditors share pro rata $18 million up to payment in full. The government keeps the $106 million down payment and is paid an additional $60 million with interest, and the licenses are put to use in the marketplace. Also under the plan, however, if the debtors default, the licenses are returned to the government.

The government gets the value of the licenses as of January 1997, or, if not paid, the licenses. And the government may pursue its appeal of the judgment. The government gets at least what it would get in Chapter 7. In Chapter 7, unless the trustee convinces the district court to order a refund on a restitution theory, the trustee will litigate with the government until the trustee's resources are exhausted, then either sell the licenses, if the FCC agrees, or return the licenses. The government then gets market value, or the licenses. That is what the plan gives the government.

The government may contest the value of the licenses in [16] January 1997, found by this court, but the court determined value based on the market. Indeed, the court would further find the plan is better for the government, because if the debtors' business plan goes effective, the government would not take the risk of a judgment ordering the return of the $106 million, which is a litigation risk that would exist in Chapter 7, and may be a compelling argument to a district court or the court of claims if advocated by a Chapter 7 trustee with only $9,000 and the licenses.

The government does at least as well in this plan as it would in Chapter 7. The administrative expense claimants, unsecured creditors at all levels and equity fare considerably better in the plan than in Chapter 7.

The government introduced evidence at confirmation that suggests a current market value of $450 million, assuming C block financing or $300 million without financing. Mr. Buono testified to that value as of June

1998. First, the court appreciates the concession that as of June 1998 the licenses were worth less than half of the amount of the notes.

Second, even if Mr. Buono is correct, the trustee could not even begin to market the licenses until the litigation is resolved, and the FCC expressed no position as part of the confirmation record from which the court could infer that the appeal of the judgment would be withdrawn. The government is intent on pursuing litigation. The trustee would have no [17] choice but to likewise defend the litigation and possibly plead alternatively for restitution.

Third, if the government believed Mr. Buono accurately assessed the current market for the licenses, the government would have withdrawn the feasibility objection, as the court will explain later.

Fourth, Mr. Buono recognized that his value was not a fair market value analyzing willing seller, willing buyer, but, rather, an analysis of the C block order options. He recognized that each license holder faced its own predicaments in deciding how to proceed under the C block order, so that their actions might be a market development, but not a measurement of value under a fair market value standard. Mr. Peshell agreed that Mr. Buono's testimony with the C block option did not amount to a fair market value analysis.

Fifth, Mr. Buono conceded that under a fair market value standard, the licenses fell within a range including the value found by the court in the judgment. As an investment banker and consultant in the communications industry, he urged on behalf of telecommunications' clients, that the FCC recognize C block license values in an amount comparable to the court's findings.

Mr. Peshell testified that the licenses may be worth as low as $60 million today.

Other witnesses testified that without an operating company, the licenses may have no value, which the court infers [18] means no realizable value in the hands of a Chapter 7 trustee.

On this [] record, the court finds it incredible that a Chapter 7 trustee could sell the licenses for $300 million cash. The greater weight of the evidence is that the trustee would be hard pressed to sell the licenses at all, let alone for enough to pay the government's secured claim.

In fairness to Mr. Buono, the court questions whether he intended his testimony be used for best interest of creditors' test.

The court concludes, for all these reasons, that the debtors have established that all creditors, including the government, will receive at least as much as they would under Chapter 7.

Because the court has treated the government as impaired with a voting class against the plan, Section 1129(a)(8) has not been established. The court will consider, therefore, the requirements of Section 1129(b). The plan complies with Section 1129(a)(9).

The unsecured creditor class for each debtor has voted to accept the plan. The plan, therefore, complies with Section 1129(a)(10). The government objects that no impaired class has accepted the plan. The court has not considered the intercompany class. The court has not considered the FCC class, since the government is deemed by the court to have rejected the plan. But the unsecured creditors have acepted [19] the plan.

The court has recognized the question of claims against the subsidiary debtors. The government contends that the debtors and unsecured creditors have manipulated the claims to meet the requirements of Section 1129(a)(10). The government presented no evidence of manipulation of claims.

These unsecured creditors filed proofs of claim against the various debtors. The debtors filed amended schedules. The debtors engaged the creditors to quantify claims against the subsidiary debtors. The government objected to the claims. The court conducted an evidentiary hearing on the claims.

Under the Bankruptcy Code a proof of claim presumptively establishes a claim that constitutes prima facie validity of the claim. The government has the burden of rebutting that presumption, thereby shift the burden of proof back to the claimants. The government presented no non-bankruptcy authority that state law would not recognize a right to payment against GWI and its subsidiaries for various services rendered.

In the avoidance adversary proceeding ruling the court held it would recognize a separate corporate existence of these debtors. The court could not and did not adjudicate claims of individual creditors in that proceeding. Creditors have claims against the debtors pursuant to court order. They have voted their claims in favor of the plan. For GWI, the Hyundai impaired class voted to accept the plan. The government's [20] objection is overruled.

The plan is feasible. The debtors have established Section 1129(a)(11). The government has objected, contending the debtors have not established this element. First, the short ruling. The plan contemplates that in the event of a default on payment to the FCC after the business plan becomes effective, the licenses are returned. The plan, thus, contemplates the manner of liquidation if the debtors are unsuccessful in the public market. If the business plan does not become effective, the plan provides for creditor treatment and the litigation trust. That meets the requirements of Section 1129(a)(11)

Second, the long ruling. The debtors have articulated a business plan designed to capture a portion of the wireless markets in the San Francisco, Miami and Atlanta region with a program designed to provide services at 800 minutes for $40, what Mr. Linquist called freedom of use. I suspect most everyone in the courtroom during the confirmation hearing would buy that service. Total wireless use in these markets is increasing. The debtors' price structure should capture the relatively small percentage of that market necessary for plan success. Indeed, the debtor may only need to capture churn or customer changes to be successful, which should be reasonably accomplished with the debtors' projected price for services.

Lucent Technology, Incorporated has committed to providce [21] approximately $340 million of vendor financing to fund the build-out of the debtors' PCS network. The evidence suggests that the infrastructure should be established with that capital and that the technology should work. Mr. Linquist and his management team have a proven and impressive track record in communications business development in the market. Mr. Linquist testified that sales people in retail stores will have incentives to sell GWI services. With Lucent's fast-start program infrastructure development can begin immediately and services could be broadly presented in GWI's markets by the holiday season of 1999.

Mr. Medlin testified that the debtor had a reasonable likelihood of implementing its business plan. The government presented no evidence to the contrary. Mr. Alex testified that with senior debt of $60 million, which is the government's secured claim, the public market for high-yield debt should be receptive to the $150 million offering of senior subordinated notes.

Lucent has committed to purchasing $40 million of that debt. Mr. Alex testified that he will recommend that Prudential Securities, Inc. will be the debtors' lead investment banker for the offering. Although recognizing he is bullish on telecommunications, he articulated several reasons why the public market should be receptive to this offering, including the credibility of management and macro and micro [22] market factors.

Micro factors focused on the debtors' markets. He also testified that the business plan was feasible. Mr. Frost tesitfied that with the Lucent commitment and the likelihood of raising funds in the bond market with the senior debt of the government at $60 million, access to the equity market should thereafter follow.

Mr. Buono, on the other hand, testified that a start-up company like the debtors will not be a prime candidiate for financing in the public captial market. He questioned whether the debtors' efforts to raise these funds can be successful. Yet, he also testified that with government financing, the debtors' licenses are currently worth $450 million. If he is correct, the debtors should have no problem raising the capital required by their business plan, since the plan of reorganization will create secured senior debt of $60 million to pay for assets worth $450 million.

With Lucent on board, the capital markets would jump at the package. The court does not accept Mr. Buono's value, and has no reason to make a finding of fact concerning that value. But if the government believes its expert witness, then feasibility of this plan is not an issue.

Even if this is not a fair inference to draw from Mr. Buono's testimony, Mr. Buono did not testify that Mr. Alex and Mr. Frost were wrong, or that GWI would not be successful in [23] the public market. He only testified that the debtors were not a prime candidate for the marketplace.

Section 1129(a)(11) does not require that the court find that the plan will succeed, only that it is more probable than not that the plan will succeed. Based on a preponderance of the evidence, the debtors have met this standard. The government's objection is overruled.

The plan complies with the requirements of Section 1129(a)(12) and, to the extent applicable, with Section 1129(a)(13).

The FCC is deemed by the court an impaired class for each of the subsidiary debtors. The FCC has been deemed to vote against the plan. A plan may only be confirmed if a plan is fair and equitable under Section 1129(b). As the 5th Circuit has explained, fair and equitable standards includes both the technical requirements of Section 1129(b) and the court's discretionary assessment of the class.

The government holds a secured claim. The government retains its security interest in the licenses. The plan provides that the government will receive deferred cash payments equaling a present value of the secured claim, found by this court to be $60 million. The government has preserved its objection to this adjudication and has appealed the judgment. But the plan provides for, payment in full of the secured claim as adjudicated by this court.

[24] The government also objects to the interest rate of six and a half percent. Under Section 1129(b), the plan must pay an interest rate sufficient to provide the government with the present value of its claim, $60 million. An interest rate sufficient to deliver present value of the secured claim to the creditor is not necessarily synonymous with market rate or contract rates of interest which is why Congress legislated different rates for different situations. Compare Section 362(d)(3)(b) with Section 1322(e) and 1325(a)(5)(b)(ii), 1129(b)(2)(a)(i).

Lenders do not usually make loans without an anticipation of realizing a return greater than the value of the property they already have. The court is sympathetic to the government's argument that the court should apply a methodology of using the treasury rate plus risk factors for present value calculations.

Indeed, the court used that approach for a decade, until the 5th Circuit ruled in the matter of Smithwick. Now the court is bound by the 5th Circuit's determination in Smithwick. The 5th Circuit has established a rebuttal presumption that the parties' contract rate of interest should be used as the rate of interest to assure payment of present value. That was a Chapter 13 case. The present value requirements are the same as Section 1129(b). The message of the 5th Circuit is presume the contract unless there's evidence to rebut that presumption.

[25] The parties' contract rate, therefore, is presumptively a rate that will pay present value. The debtors have incorporated the contract rate. The government has provided no evidence to rebut the presumption that its own contract rate does not assure present value. The government argues that the debtors' financial records and disclosure statement reflect a 14 percent rate in the market, with a present value of the $60 million debt of $38 million.

Mr. Spickler has hypothosized the market could be as high as 16 percent; although, he did not investigate this question in the market. He also testified that the contract rate was greater than the treasury rate. This testimony does not rebut the presumption to be accorded the parties' contract. The FCC is assessing interest rates pursuant to a process implementing the Communications Act. The interest rate is incorporated into a contract. The interest rate must be consistent with the Communications Act. The government cannot discrim[]inate against these debtors under the Act.

The court questions whether a creditor can rebut the presumption accorded a contractu[]al rate of interest it establishes and the debtor has agreed to. The court concludes that whether a creditor generally must now be held to his contract, after Smithwick, the government can not disavow its contract interest pursuant to the Communications Act. And the government has failed to rebut the presumption accorded to its [26] own contractural terms.

The court adopts the schedule of the proofs of claim as adjusted per each subsidiary debtor as set forth in the debtors' proposed findings and conclusions. The government stipulates that the schedu[les] are consistent with the judgment. The court also adopts the amortization schedules attached as an exhibit to the proposed findings and conclusions. The government stipulates that the amortization schedules are consistent with the judgment.

The plan, therefore, meets the requirements of Section 1129(b)(2)(a).

All unsecured creditor classes have accepted the plan. The government does not have an unsecured claim. The government contends that it should not have an unsecured claim. The government maintained in the adversary proceeding that its entire claim ought to be a secured claim. The government has not moved this court to establish, to estimate or to temporarily allow it an unsecured claim.

The debtors had filed a motion to determine whether the government should have an unsecured claim pursuant to Section 506 of the Code. The debtors have withdrawn that motion. Section 1129(b)(2)(b) does not apply. The class of interests for each debtor has approved the plan. Section 1129(b)(2)(c) does not apply. The debtors have met the technical fair and equitable requirements of Section 1129(b).

[27] The court next turns to the discretionary analysis. The government complains that the debtors may pursue litigation to equitably subordinate its claim. The debtors had included a count for equitable subordination in the avoidance adversary proceeding. The debtors have voluntarily dismissed that count pursuant to Federal Rules of Civil Procedure 41. The government complains that the dismissal is without prejudice, but that is the way the procedural rule works, unless the court orders otherwise. Equitable subordination of

the government's claim is therefore not before the court in any complaint and is not part of this plan.

The government also complains that the plan cannot be confirmed with the appeal of the adversary proceeding pending. Of course, it can be if the provisions of Section 1129 have been met. The question becomes whether it should be if confirmation followed by implementation on the effective date renders the appeal moot. Section 1129(b) provides the appropriate place to address relief pending appeal. It would not be fair and equitable for the government for the plan as modified and as confirmed not to provide protective treatment for the government that would assure that the appeal not be moot.

Further, although the government has not moved for a temporary or a full allowance of an unsecured claim, the government in its request for relief pending appeal asked this [28] court for protection should it obtain a deficiency judgment. It included a deficiency judgment argument in its summary judgment argument in the adversary proceeding.

On the other hand, it would not be fair and equitable to the debtor and all the other parties in interest if reorganization failed because of the stay pending appeal. The 5th Circuit has admonished bankruptcy courts not to inappropriately permit an appeal to become moot by the implementation of a superseding plan.

At several points in this ruling I've made reference to the 5th Circuit, and, unfortunately, I don't have my cases handly and could not access West Law on the airplane, so while I don't have cites, this cite comes from a Sullivan Central decision in a footnote. Bankruptcy Rule 8005 and Federal Rule of Civil Procedure 62 contemplate the bankrputcy court has discretion to fashion a remedy pending appeal. The government recognizes this discretion.

Section 105 of the Bankruptcy Code authorizes the bankruptcy court to issue any order necessary or appropriate to implement the provisions of the Code. Although an appeal mooted by an effective reorganization would not violate the public policy of Chapter 11 of the Bankruptcy Code, nor Section 309 of the Communications Act, the court concludes that to assure a fair and equitable plan, the court must preserve an effective appeal pursuant to this court's discretionary [29] authority.

Accordingly, the confirmation order should include the following provision. In the event that the judgment is not finally affirmed, or, rather, the appellate process ultimately results in a judgment producing a claim in an amount greater than $60 million for the government, then the government's secured claim shall be increased up to the final amount of the final judgment or the value established at the reauction of the returned C block licenses, whichever is smallest.

In the event the ultimate allowed claim is greater than the value established by the reauction of the C block licenses, the government shall have an unsecured claim for the difference. The increased secured claim shall bear interest at 6.5 percent pursuant to the parties' contract and must be paid in order for the debtors to retain the licenses.

However, the difference between this amount and the $60 million shall not be payable, either interest or principal, until the expiration of the 10-year term of the high-yield debt unless the debtors exercise the five year redemption option under that debt, in which case amortized payments would begin immediately following that redemption.

Because the government will receive interest to assure present value, these deferred payments will still result in payment of the secured debt. But by deferring the payments of the notes, the debtors preserve a capital structure with only [30] $60 million of senior debt necessary to market the high yield notes.

In the event of an unsecured claim, the unsecured claim will be included in the pot of unsecured claims to share the $18 million with the other unsecured creditors pro rata.

The court has chosen the reauction to set the value of the collateral in deference to the FCC. The market will be established in a process and under the direction of the FCC. The debtors shall calculate the per POP price at the auction and multiply that price by the POPs covered by its licenses. The court recognizes that the debtors' markets have different demographics than many of the markets subject to the reauction.

In off-the-record discussions with the parties, the court invited the government to submit a formula to adjust for that difference. The government declined that invitation. Mr. Buono testified about the differences in the market, but he had not been charged with developing a model to convert the reauction to GWI's market for value purposes.

While the application of a price per POP without adjustment may not be a perfect assessment of value for the debtors' licenses, it is a fair and equitable method. It defers to an FCC process. It defers to a market process without court involvement. It provides a practical and pragmatic method of value without further litigation, and, as mandated by Congress, in Section 309 of the Communications Act, [31] without administrative or judicial delay.

With this provision, the plan, as confirmed by the court, should prevent the appeal of the judgment from becoming moot. In the event that the judgment is not affirmed, but, rather that the government receives an allowed claim for greater than the $60 miillion, it provides for treatment of the government consistent with Section 502 and 506 of the Code, and Section 1129 with a secured claim paid in full, and, if applicable, an unsecured claim treated as all other unsecured claims in the subsidiary debtors.

It does so without the need for further litigation once the adversary proceeding is completed, and it permits the reorganization of the debtor in a manner conisistent with the policies legislated by Congress in Section 309 of the Communications Act. Yet, it does so in a manner that will not alter the economics of the debtors' business plan or public offering.

The record should reflect that in off-the-record discussions the court broached this provision with the parties, inviting their input and analysis. The court, frankly, anticipated that the provision would be a mechanism upon which a settlement could be structured. The government could not consent to this provision. But the court has provided the parties with the opportunity to reflect and comment on the provision.

[32] The court does not include this provision to force a settlement on any party. The parties have chosen not to settle. Rather, the court includes this provision to

assure that confirmation and implementation of the plan not render the appeal of the judgment moot, thereby preserving the appeal. The court assures that the plan, as confirmed, is fair and equitable and in the exercise of its discretion under Section 105 and Bankruptcy Rule 8005.

The court recognizes that this provision does not assure that the government receive the ultimate and complete relief it seeks in the appeal. The government has chosen to appeal the judgment and contest the plan. That is its right. But Section 1129(b) only mandates a fair and equitable treatment. This provision assures that treatment consistent with the Bankruptcy Code, and it also fulfills the mandate to prevent an appeal from unnecessarily becoming moot.

The court further recognizes that it has imposed this provision on the plan sua sponte in an effort to assure that the plan does not moot the appeal. The debtors may believe that the court has abused its discretion by imposing this condition on the plan. The provision shall be a separate numbered paragraph in the confirmation order which can be struck without affecting the remainder of the confirmation order, should an appellate court conclude that the fair and equitable clause of Section 1129(b), or the standards for [33] relief pending appeal, coupled with Section 105 does not support this adjudication.

There is no other plan of reorganization that has been moved for confirmation. This is the only plan pending before the court under Section 1129(c).

The primary purpose of the plan is not the avoidance of taxes or the Security Act. That's Section 1129(D).

The issuance of the notes, stock and warrants pursuant to the plan shall be exempt from registration under the Securities Act of 1933 and any state or local law requiring registration. The securities shall be transferable by the initial recipients in accordance with Section 1145(a) of the Bankrputcy Code, except pursuant to 1145(b) and subject to restrictions in the securities themselves, or in the plan or the plan documents or the confirmation order. The litigation trust shall be a successor to the debtor under Sections 1123(b)(3)(b) and 1145 of the Code.

The court has considered the government's objections and supplemental objections. The government has had an adequate opportunity to review the modifications submitted by the debtors. Except for two rulings, the court has addressed all the government's objections.

First, the confirmation order shall provide that the licenses can only be transferred by the debtors consistent with FCC rules and regulations.

[34] Second, the plan does not provide for payment of unsecured claims at the subsidiary debtors' level in full. Rather, the claimants receive their pro rata share of the $18 million pot. Unless the provisions of the confirmation order for the government is triggered by an appellate court decision, unsecured creditors will likely be paid in full from the pot. But if the government ends up with an unsecured claim in this process, then all unsecured creditors share the pot pro rata, which is what the unsecured creditors voted for. To the extent any objections are remaining, they are overruled. The debtors' motion to strike the supplemental objection and for sanctions is denied.

With these rulings, the objections to confirmation have been satisfied or overruled.

Accordingly, the plan, as modified, is confirmed with a confirmation order to reflect the provisions of this ruling.

The court will enter a standard post confirmation order which will govern scheduling unless the plan or confirmation order provide otherwise. Following the ruling on the motion for relief pending appeal, the court will review the form of the confirmation order proposed by the debtors. Counsel for the debtors shall submit a revised proposed order consistent with these findings and conclusions with copies to other parties in interest. Because the court will not be in Dallas until Monday, the debtors are authorized to commence [35] implementation immediately. The Clerk of the bankruptcy court will accept a fax transmission of an order signed by this court for entry.

Next, I'll turn to relief pending appeal of the confirmation order. With the utmost respect and deference to the litigation posture and position of the Justice Department, this court questions whether the plan, as modified and as confirmed by this court, has resulted in an order reviewable on appeal by the government. The question is may the United States be aggrieved by receipt of over $100 million for the right to use a portion of airwaves without interference with the regulatory requirements of the FCC, with the avoidance judgment preserved for appellate review, all consistent with the expressly articulated and legislated policy of the Congress in Section 309 of the Communications Act? This question of justiciability implicates the appellate process and must be decided by the appellate courts, should the United States elect to appeal the confirmation order.

The court assumes that the United States will appeal, and addresses relief pending appeal. A request for relief pending appeal must ordinarily be presented in the first instance to the bankruptcy court, pursuant to Bankrputcy Rule 8005. The bankruptcy court may, in its discretion, fashion a remedy to protect the rights of all parties in interest. The court has already done so in the confirmation order.

[36] The confirmation order permits the debtors to implement their plan with a debt and capital structure acceptable for the Lucent vendor financing which can be presented to the capital markets by the investment bankers. The order approves the Hyundai settlement. Unsecured creditors will be paid in a manner acceptable to them. The government will be paid the value of the licenses as determined by this court with all other terms and conditions pursuant to the parties' contract.

The government will retain the $106 million down payment. The plan, more likely than not, will effectively make the debtors an operating company with services in the marketplace. Offensive litigation against the government will end. The plan operates consistent with the FCC's regulatory process. Should the government prevail on appeal of the judgment, the confirmation order assures the government a treatment consistent with the Bankruptcy Code, but in a manner that should not hinder the debtors' business plan nor its ability to finance the plan. Should the debtors default on their notes to the government, the licenses will be returned to the FCC. The appeal of the judgment is effectively protected, while at the same time, protecting the debtors, all other creditors, interest holders and the integrity of the Chapter 11 process.

The analysis of the request for relief pending appeal should end. The court has, in the confirmation order, protected the government's appeal of the judgment, while [37] protecting the rights and interests of all other parties in interest. All further relief pending appeal should be denied.

But the court must, nevertheless, analyze the two other arguments the government has set forth. The first is the contention that the government has a right to a stay of the effective date of the plan pending appeal, and the second is the four grounds for relief pending appeal.

The court does not read Rule 62 or Rule 8005 as giving the government a right to a stay pending appeal. The rules provide that the government shall not be ordered to post a bond, but, otherwise, do not mandate court action. The issue is academic. The confirmation order provides relief to the government.

With regard to the four grounds for relief pending appeal established by the 5th Circuit, the United States must show a likelihood of success on appeal. The 5th Circuit has rejected the alternative test of a substantial question for appeal. The government has not shown a likelihood of obtaining an order reversing the confirmation order. If the court has erred, it has probably done so in the government's favor. Indeed, if the court has exceeded its discretion, it may be with the relief accorded to the government in the confirmation order.

The United States must also show that a stay or other relief pending appeal will not harm the debtors. Mr. Buono, the government's expert witness, conceded that the debtors would be harmed by a further delay. He testified that the harm [38] will not be as great as the debtors fear because of several factors partially offsetting the harm caused by the delay to market. But he, in effect, recognized that the offsetting factors will not negate the harm, just lessen it. The government's evidence therefore recognizes the debtors will be harmed.

The debtors' evidence establishes that the delay could be fatal. The debtors' DIP financing will be exhausted in two months. The debtors will then have to cease operations. Although the court has authorized DIP financing up to a million dollars, the court cannot compel investors to loan the debtor any more money. Mr. Linguist testified further loans were not likely. The government presented no evidence how the debtor could continue to finance Chapter 11 administrative expenses and survive. Mr. Linquist testified that the debtors would be out of cash reserves to pay expenses.

Mr. Alex testified that the licenses would dimninish in value if not presented to the market as soon as possible. The debtors must be able to present their offering to the markets within the next few weeks to have a probable likelihood of raising capital by Thanksgiving. If they fail to meet that time, they likely will be precluded from selling their high-yield securities until 1999 when the market may then be focused on the spring reauction by the FCC of the returned C block licenses.

[39] Mr. Medlin testified that such delay would not make this business strategy unfeasible. But that's not the harm. Mr. Alex testified the harm would be the increased market risk by the growing proximity of reauction. The debtors' witnesses testified about a

scenario of decreasing C block license value. The risk is less before Thanksgiving. The increased risk of delay falls directly on the prospects of a successful reorganization.

The court has already found that Chapter 11 is a better alternative for administrative expense claimants, unsecured creditors and equity holders. Thus, all are harmed by the increased risk of a successful reorganization caused by delay.

Mr. Linquist also testified that delay would result in a failure to market services to customers by the holiday season 1999; thereby, undermining the business plan and the prospects for a successful reorganization. Mr. Linquist called the stay tantamount to a dissolution. The court finds the stay would be fatal to a Chapter 11 reorganization. The court further questions in this regard whether Section 309(j) precludes the government from asking for a delay.

Meanwhile, the United States must establish that it would be irreparably harmed without a stay of the effective date of the confirmation order. The government has not shown any harm. The government can only win. It holds $106 million for the right to use airwaves. It will collect at least $60 million [40] more, plus interest, or, if a default occurs, obtain the licenses. The court says "at least" because if the government prevails on its appeal of the judgment, under the confirmation order, it has the prospect of an even greater return. This is accommplished without interfering with the FCC's regulatory function.

As a creditor, the government can only have a positive recovery. That's with one exception. The continued prosecution of the appeal of the judgment does have the iltigation risk of a restitution order. The government controls that factor. And, the debtors are committed to implementing this plan which would necessitate the use of the licenses.

The Congress mandated that the FCC promote the development and rapid deployment of new technologies, products and services for the benefit of the public without administrative or judicial delay. This plan, with a business objective of providing wireless telephany services in the San Francisco, Miami and Atlanta markets of 800 minutes for $40 would accomplish that goal. But the government argues that the process should be judicially delayed because it would be irreparably harmed without the delay, and the debtors would not be harmed with the delay. The government has no evidence to support that argument.

Finally, public policy. Public policy has been set by [41] Congress. A stay of the confirmation order would be contrary to public policy. Implementation of the confirmation order without delay would further public policy.

First, the policy of chapter 11. Without a stay, the debtors would be reorganized and operative. Unsecured creditors would be paid in a manner acceptable to them. Interest holders would have an opportunity to preserve their investment. The FCC regulatory process would proceed. The FCC, as a creditor, would recover pursuant to the Bankruptcy Code.

Based on Mr. Linquist and Mr. Spickler's testimony, approximately 600 to 700 salaried employment positions may be created during the life of the business plan. An equal number of commissioned sales positions may be created, operating out of 1,000 storefronts, retail operations locally or regionally owned. Mr. Linquist testified they would likely be paid $150 million in commissions and incentives by year seven of the plan. As many as 1,000,000 customers may be served by the year 2005, who the debtors project will be new wireless customers. This does not include customers who may be lured from other service providers.

In other words, for San Francisco, Atlanta and Miami markets, competition will be enhanced with more wireless services available. Mr. Linquist estimated revenue of $650 million by year seven of the business plan. Sales, use, [42] property and income taxes will be generated in significant amounts. Five hundred site locations will be purchased. Vendors will sell products and construct infrastructure. Taxable capital gains and interest income may be generated in the public offerings. These are all the very goals of Chapter 11 reorganization. Impelmentation of the plan without a stay would further all of the goals of Chapter 11.

Next, the Communications Act. This court appreciates the deference owed to the FCC in the implementation of the Communications Act. This court is not performing any function of review of the FCC's regulatory process or function. This court recognizes that the FCC has its own view of the best way of proceeding with C block licenses pursuant to Section 309 of the Communications Act. But this court must decide this bankruptcy case and this court must decide this motion for relief pending appeal. And a court can only decide a case based on the particulars of that case.

In doing so, this court is fortunate. Unlike some legislation, Congress has legislated the public policy factors to be promoted by the C block licenses. Even if the FCC would approach those mandated policies differently, this plan is fully consistent with those policies. Implementation of the plan would further those policies, while delay would frustrate them. As mandated by Congress, implementation of the confirmation order without a stay would promote development and [43] rapid deployment of new services for the benefit of the public without administrative or judicial delay. It would also promote economic opportunity and competition for new and innovative technological services for the public by disseminating licenses to a small business as mandated by Congress. It would also recover for the public a portion of the value of the public spectrum resource made available for commercial use. Congress told the FCC to recover a portion of the value of the public spectrum.

This plan accomplishes those goals. In effect, Congress mandated an efficient pragmatic business approach. This plan is consistent with the stated legislative policy of Section 309.

Proceeding without delay would therefore, further that policy. The government has failed to establish any of the elements for relief pending appeal. The confirmation order assures that the appeal of the judgment will not be rendered moot.

Any further relief should be denied, and is denied.

Finally, the motion for relief pending appeal of the judgment, that is a request to stay the effectiveness of the judgment.

In the confirmation order the court has endeavored to fashion a remedy that preserves the appeal of the judgment without its becoming moot by the implementation of the plan of [44] reorganization. No further relief is necessary or appropriate. Nevertheless, the court will briefly analyze the four factors as applicable to the appeal of the judgment.

Substantial likelihood of success on appeal. This court does not believe, with the appeal pending, it should be commenting on the various arguments summarized by the parties to the court regarding the judgment. It's not appropriate to comment on the merits. The court will simply find that there is not a substantial likelihood that it will be reversed. But in doing so, the court recognizes it's always a difficult call for a trial court.

As to the other three elements, the court's analysis is the same as for a stay pending appeal of the confirmation order. The court has provided relief for the government in the confirmation order so that the appeal of the judgment should not be rendered moot. Having done so, for the reasons previously stated, the government has failed to establish any of the elements for relief pending appeal. To the contrary, the record establishes that a stay should not be granted. A stay would prevent the debtors from implementing the plan, which would likely cause the debtors to fail, with the licenses being returned to the government. Thus, a stay would moot both confirmation and the debtors' opportunity to obtain a meaningful affirmance of the judgment.

For these reasons the motion for a stay of the judgment [45] pending appeal is denied.

That completes the findings and conclusions. I've got a couple of comments that I'll briefly make on the form of the amended proposed order. And they are quite brief. Paragraph B on page two, the words "in all respects" should come out. The plan has not been confirmed in all respects.

Paragraph E of the findings and conclusions should just be a reference to the bench ruling.

Paragraph M may be the appropriate places to insert the provisions regarding the trust only being operative by court order after notice and hearing, but that could be done in a separate paragraph as well.

Paragraph T needs to be amended to reflect the court's bench ruling, that the court has not approved all of the terms of the documents, but that language needs to be harmonized with the court's bench ruling.

Paragraph Y, and the same will hold for FF and GG, I believe would only be appropriate if they are in the plan and disclosure statement and creditors were actually asked, or were informed, and given an opportunity to object if the debtors were going to seek that relief. Otherwise, it should be deleted and another time the provision could be presented by separate motion.

Paragraph V should probably make reference to the bench ruling.

[46] Paragraph FF, it's probably not necessary. I'll just enter a post confirmation order.

Paragraph UU, the debtors will have to take a look at it in light of the court's protective order for the government and then I believe there will have to be a paragraph added to the draft for what the court directed for relief for the governemnt for the appeal.

Finally, I believe there's a provision which says that the order is effective when it's dated. But, actually, that can provide that it is effective as of right now.

*   *   *   *   *

THE COURT: Let me clarify for the record, in the First Republic case, the United States District Court for the Northern District of Texas held that the bankruptcy court has discretion to waive the provisions of Rule 62 when the facts and circumstances of a case were appropriate. And this ruling establishes that it's appropriate here. The government having been fully protected in its appeal right, debtor having a tremendous amount of work to do in order to get this to the marketplace, there is no reason to delay the process.

*   *   *   *   *

THE COURT: Excuse me. I think that should cover it. That gives everybody a 24 hour breather. It should not affect the debtor at all for 24 hours.

*   *   *   *   *

[47] (End of Court's ruling.)

CERTIFICATE

I, VICKI K. KANEWSKE, Acting Official Court Reporter in and for the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, certify that during the hearing of the above-entitled and numbered cause, I reported in shorthand the proceedings hereinafter set forth, and that the foregoing pages contain a full, true and correct transcript of said proceedings.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this the 5th day of September, 1998.

/s/ VICKI K. KANEWSKE
VICKI K. KANEWSKE
Certified Shorthand Reporter #2159
Acting Official Court Reporter
United States Bankruptcy Court
Northern District of Texas
Dallas Division

APPENDIX F

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(Case No. 397-39676 through
Case No. 397-39689, 398-30727,
and 398-30728)

CHAPTER 11
(Jointly Administered Under Case
No. 397-39676-SAF-11)

IN THE MATTER OF: GWI PCS 1 INC.;
GWI PCS 2 INC.; GWI PCS 3 INC.;
GWI PCS 4 INC.; GWI PCS 5 INC.;
GWI PCS 6 INC.; GWI PCS 7 INC.;
GWI PCS 8 INC.; GWI PCS 9 INC.;
GWI PCS 10 INC.; GWI PCS 11 INC.;
GWI PCS 12 INC.; GWI PCS 13 INC.;
GWI PCS 14 INC.; GWI PCS INC., AND GENERAL
WIRELESS INC., Debtors

[Filed: Sept. 10, 1998]

ORDER CONFIRMING SECOND AMENDED PLAN OF REORGANIZATION OF GENERAL WIRELESS, INC., AND GWI PCS, INC. AND THE THIRD AMENDED PLAN OF REORGANIZATION OF THE SUBSIDIARY DEBTORS

Upon the Second Amended Plan of Reorganization of General Wireless, Inc. and GWI PCS, Inc. and the Third Amended Plan of Reorganization of the Subsidiary Debtors, including the technical amendments thereto proposed on August 28, 1998 in the Motion Pursuant to Section 1127 of the Bankruptcy Code to Technically Modify the Plan and the September 8, 1998 Motion to Further Technically Modify the Plan (together, the "Modification Motions") (collectively, the "Plan"), filed by General Wireless, Inc. ("GWI"), GWI PCS, Inc. ("GWI PCS"), GWI PCS 1, Inc., GWI PCS 2, Inc., GWI PCS 3, Inc., GWI PCS 4, Inc., GWI PCS 5, Inc., GWI PCS 6, Inc., GWI PCS 7, Inc., GWI PCS 8, Inc., GWI PCS 9, Inc., GWI PCS 10, Inc., GWI PCS 11, Inc., GWI PCS 12, Inc., GWI PCS 13, Inc. and GWI PCS 14, Inc. (collectively, the "Subsidiary Debtors"); and a hearing on the confirmation of the Plan (the "Confirmation Hearing") having been held on August 31, September 4, and September 8, 1998; and good and sufficient notice of the Confirmation Hearing having been given; and upon the record of the Confirmation Hearing, the representations of counsel on the record and the Court's Bench Ruling of September 9, 1998, all of which are incorporated herein by reference; and good cause appearing therefor, it is

A. ORDERED that the technical modifications set forth in the Modification Motions are not material in any way, and no further solicitation is required. The Modification Motions are granted. All holders of claims or interests are hereby deemed to have accepted or rejected, as the case may be, the Plan as modified; and it is further

B. ORDERED that the Plan shall be, and hereby is, confirmed pursuant to Section 1129 of the Bankruptcy Code; and it is further;

C. ORDERED that this Order shall be deemed to be and hereby is of full force and effect as of September 10, 1998 at 4:00 p.m., Central Daylight Time; and it is further

D. ORDERED that upon entry of this Order, all conditions precedent set forth in Section 12.1 of the Plan shall have been satisfied; and it is further

E. ORDERED that the Court's Bench Ruling of September 9, 1998, constitutes the court's findings of fact and conclusions of law; and it is further

F. ORDERED that any objections to confirmation of the Plan that have not been withdrawn before the date of this Order or are not cured by the relief granted hereby, shall be and hereby are overruled; and it is further

G. ORDERED that all payments made or to be made by the Debtors or by a person issuing securities or acquiring property under the Plan for services or for costs and expenses in or in connection with these Chapter 11 Cases or in connection with the Plan and incident to these Chapter 11 Cases, including fees and expenses payable to Lucent, Prudential and the Escrow Agent, have been disclosed to the Court and are hereby deemed to be reasonable and are approved; and it is further

H. ORDERED that the Debtors and their respective directors, officers, agents, attorneys and representatives are authorized and empowered to carry out all the provisions of the Plan and to take such actions, execute and deliver the Plan Documents substantially in the form filed with the Court as harmonized to reflect the Court's September 9, 1998 Bench Ruling, and all such other documents, and to do all such further acts and things as are necessary, useful or appropriate to effectuate, implement and consummate the Plan and this Order, and the Debtors and their respective directors, officers, agents, attorneys and representatives are authorized to deliver, file and record such documents, certificates, reports or instruments with the appropriate federal, state, commonwealth, local, foreign or other governmental authorities and with such other entity or entities as may be necessary, useful or appropriate to effectuate, implement or consummate the Plan and this Order; and it is further

I. ORDERED that each and every federal, state, commonwealth, local, foreign and other governmental authority, agency or department is hereby directed to accept any and all documents and instruments necessary, useful or appropriate to effectuate, implement or consummate the transactions contemplated by the Plan and this Order; and it is further

J. ORDERED that all approvals and consents of the equity interest holders, and officers and directors of the Debtors, as may be necessary to implement and carry out the Plan and the actions authorized by this Order be, and they hereby are, deemed made or done; and it is further

K. ORDERED that the automatic stay imposed by Section 362 of the Bankruptcy Code is hereby modified as necessary to allow the execution, delivery, filing and recordation of the Plan Documents and any other documents, certificates, reports, UCC financing or termination statements or instruments in connection therewith as are necessary, useful or appropriate to effectuate, implement and consummate the Plan; and it is further

L. ORDERED that in accordance with Sections 1141(b) and (c) of the Bankruptcy Code, all property and assets of the Debtors' estates shall vest in the

Reorganized Debtors free and clear of all claims, liens, encumbrances, charges and other interests of creditors and equity interest holders, except as otherwise provided in the Plan or the Plan Documents; and it is further

M. ORDERED that all property to be assigned, transferred or conveyed by the Debtors to the Litigation Trust in accordance with the terms of the Plan and the Litigation Trust Agreement shall be assigned, transferred or conveyed free and clear of all liens, claims, encumbrances, charges and other interests of creditors and equity interest holders of the Debtors, and shall be deemed: (i) legally, validly and effectively transferred in accordance with the provisions of the Plan and the Litigation Trust Agreement; (ii) to have been transferred without violating any fraudulent transfer or other conveyance law of the United States, and state, territory, possession or the District of Columbia, applicable to the Debtors; and (iii) deemed to have been transferred under the Plan and the Litigation Trust Agreement without subjecting the Debtors, the Litigation Trust or the Litigation Trustee to any liability to a creditor or party in interest of the Debtors' estates by reason of such transfer under the laws of the United States, any state, territory, possession or District of Columbia based, in whole or in part, directly or indirectly, on any theory of law including without limitation, any theory of transferee or successor liability. The transfer of the FCC Litigation shall not affect or impede any claims, counterclaims or other rights, defenses or causes of action which may be asserted by the FCC in the FCC litigation; and it is further

N. ORDERED that all liens granted and all pledges made by the Debtors in favor of Lucent, pursuant to and contemplated by the terms of the Note Purchase Agreement and Unsecured Creditors' Credit Agreement shall be self-executing and shall be valid and perfected immediately upon the entry of this Order; *provided*, *however*, nothing contained herein shall relieve or otherwise excuse the Debtors from obligations under the Note Purchase Agreement to execute, deliver, file or record any documents, including, but not limited to, filings under the UCC; and it is further

O. ORDERED that the assumption or rejection of executory contracts and unexpired leases, as provided in the Plan or prior Order of this Court, shall be, and hereby is, approved in all respects. Only those executory contracts or unexpired leases (i) which have been rejected prior to the date of this Order; or (ii) with respect to which a motion to reject is either pending or will be made in accordance with Section 11.3 of the Plan are not deemed assumed; and it is further

P. ORDERED that all persons having claims arising from the rejection of executory contracts or unexpired leases after the date of this Order shall have thirty (30) days after the date of such rejection to file such Claims; and it is further

Q. ORDERED that within ten (10) business days after the date this Order is entered, the Debtors shall mail to all parties in interest in the Chapter 11 Cases notice of the entry of this Order, together with notice of the last day to file requests for payment of administrative expenses, claims arising from the rejection of executory contracts and applications for allowance of compensation and reimbursement of expenses pursuant to Sections 5.1(a) and 11.3 of the Plan; and it is further

R. ORDERED that all GWI Equity Interest Holders who did not elect to become Participating Equity Interest Holders are deemed to be Non-Participating Equity Interest Holders; and it is further

S. ORDERED that this Court hereby retains, after the date hereof, jurisdiction over all matters arising in, arising under and related to the Chapter 11 Cases, for, among other things, the following purposes:

1. To hear and determine any and all pending applications for the rejection, assumption or assignment of any executory contracts and unexpired leases and the allowance of Claims resulting therefrom;

2. To hear and determine any motion, application, adversary proceeding, contested matter and other litigated matter pending on the date of this Order or hereafter properly before this Court, including, without limitation, any proceeding commenced for the purposes of avoiding, recovering or preserving for the benefit of the estates any transfer of property, obligation incurred by the Debtors, lien or set-off;

3. To ensure that distributions to holders of Claims are accomplished as provided in the Plan;

4. To hear and determine any timely objections to or applications concerning Claims or the allowance, classification, priority, compro-

mise, estimation or payment of any Claim, Administrative Claim or Equity Interest;

5. To enter, implement or enforce such Orders as may be appropriate in the event of the Confirmation Order is for any reason stayed, reversed, revoked, modified or vacated;

6. To hear and determine all Fee Applications;

7. To hear and determine any application to modify this Plan in accordance with Section 1127 of the Bankruptcy Code, to remedy any defect or omission, or reconcile any inconsistency in the Plan, the Disclosure Statement or any Order of the Bankruptcy Court, including the Confirmation Order, in such a manner as may be necessary to carry out the purposes and effect thereof;

8. To issue injunctions, enter and implement other Orders and take such other actions as may be necessary or appropriate to restrain interference by any person or entity with the consummation, implementation or enforcement of this Plan, the Confirmation Order or any other Order of this Court;

9. To hear and determine disputes arising in connection with the execution, interpretation, implementation, consummation or enforcement of the Plan, including, but not limited to, the Litigation Trust and the performance by the Litigation Trustee of his duties and obligations under the Litigation Trust Agreement;

10. To hear and determine any disputes regarding the consistency of the Plan Documents, this Order, the Plan and the Court's Bench Ruling of September 9, 1998;

11. To take any action and issue such Orders as may be necessary or appropriate to construe, enforce, implement, execute and consummate the Plan and the transactions contemplated thereby, or to maintain the integrity of the Plan following consummation;

12. To determine such other matters and for such other purposes as may be provided in this Order;

13. To hear and determine matters concerning state, local and federal taxes, including matters arising under or with respect to Sections 346, 505, and 1146 of the Bankruptcy Code;

14. To hear and determine any other matters not inconsistent with the Bankruptcy Code and title 28 of the United States Code that may arise in connection with or are related to the Plan;

15. To enforce all provisions of the Confirmation Order; and

16. To enter a final decree closing the Chapter 11 Cases; and it is further

T. ORDERED that all the following Plan Documents, in the forms submitted to the Court, are consistent with the Plan, and are hereby approved substantially in the forms filed with this Court and as hereafter modified to conform to the Court's September 9, 1998 Bench Ruling:

1. Second Amended and Restated Certificate of Incorporation of General Wireless, Inc.;
2. Amended and Reinstated Certificate of Incorporation of GWI PCS, Inc.;
3. Amended and Restated Certificates of Incorporation for GWI PCS 1 through GWI PCS 14;
4. First Amended and Modified Installment Payment Plan Note;
5. First Amended, Modified and Restated Security Agreement;
6. Stock Option Plan;
7. High Yield Offering Memorandum;
8. Unsecured Creditors Credit Agreement between Lucent and GWI;
9. Lead Investment Banker Term Sheet (Prudential);
10. Settlement with Hyundai Electronics America;

    Amended Term Sheet

    Mutual Release Agreement

11. Litigation Trust Agreement;
12. Unit Purchase Agreement;
13. Vendor Financing (Lucent);

Equipment Purchase Agreement between Lucent and GWI, dated August 14, 1998;

Credit Agreement among Lucent, GWI and GWI PCS, dated as of August 14, 1998;

Letter Agreement—Debt Securities among Lucent, GWI and GWI PCS, dated as of August 14, 1998;

Letter Agreement among Lucent, GWI and GWI PCS, dated as of August 14, 1998;

14. Escrow Agreement and Letter Agreement;
15. $30 million Note Purchase Agreement among Lucent, GWI and GWI PCS, dated as of August 14, 1998;
16. Amended and Restated Bylaws of General Wireless, Inc.;
17. Amended and Restates Bylaws of GWI PCS, Inc.; and
18. Amended and Restates Bylaws of GWI PCS 1 through GWI PCS 14;

and it is further

U. ORDERED that the Effective Date shall not occur until such time as all of the conditions precedent set forth in Section 12.2 of the Plan have been satisfied or waived by the Debtors; and it is further

V. ORDERED that the Debtors are hereby authorized and empowered to execute, deliver and perform their obligations under the Plan Documents, including under (i) the Vendor Financing documents, including (a) the $18 million Unsecured Creditors' Credit Agreement, and all exhibits, schedules and documents annexed thereto; (b) the $30 million Senior Note Purchase Agreement and all exhibits, schedules and documents annexed thereto; (c) the Credit Agreement and all exhibits, schedules and documents annexed thereto; (d) the $40 million Debt Securities Letter Agreement; and (e) the Letter Agreement; (ii) the Mutual Release with Hyundai; (iii) the Amended Term Sheet; (iv) the Litigation Trust Agreement; (v) the Escrow Agreement; (vi) the First Amended and Modified Installment Payment Plan Notes; (vii) the First Amended, Modified and Restated Security Agreements; (viii) the Unit Purchase Agreement, and all exhibits thereto; and (ix) the Lead Investment Banker term sheet, all substantially in the forms submitted to the Bankruptcy Court as Plan Documents and as hereafter modified to conform to the Court's September 9, 1998 Bench Ruling; and it is further

W. ORDERED that on the Effective Date, the Debtors shall execute, deliver and perform under the Plan Documents, substantially in the forms filed with the Court and approved by this Order; and it is further

X. ORDERED that upon execution and delivery of each of the above-mentioned Plan Documents to which the Reorganized Debtors or any of them is a party, substantially in the forms submitted to the Court as Plan Documents and as approved by this Order, such documents shall constitute legal, valid and binding obligations of the Reorganized Debtors, enforceable against them in accordance with their respective terms; and it is further

Y. ORDERED that pursuant to Section 1123(b)(3)(B) of the Bankruptcy Code and Section 6.2 of the Plan, the Litigation Trust shall be the representative of both the Debtors' estates and the Beneficiaries of the Litigation Trust for purposes of pursuing the FCC Litigation, in accordance with the terms of the Plan, the Litigation Trust Agreement, and the Court's Bench Ruling of September 9, 1998; and it is further

Z. ORDERED that notwithstanding anything in the contrary in the Litigation Trust Agreement, the Litigation Trust shall not become effective without leave of this Court, after notice and a hearing; and it is further

AA. ORDERED that Steven Turoff is hereby appointed as the Litigation Trustee, with such power and authority with respect to the FCC Litigation as set forth in the Plan and the Litigation Trust Agreement; and it is further

BB. ORDERED that Roger D. Linquist, John R. Lister, and Albert S. Loverde (collectively, the "Directors") are hereby appointed as the initial directors of Reorganized GWI PCS and the Reorganized Subsidiary Debtors from and after 8:00 a.m. Central Standard Time on the Effective Date. Without further action by any person, the Directors shall commence their status as directors of Reorganized GWI PCS and the Reorganized Subsidiary Debtors as of the Effective Date. Nothing set forth herein shall prevent any of the Directors from resigning as a Director of Reorganized GWI PCS or the Reorganized Subsidiary Debtors at any time without further Order of this Court. If a vacancy occurs in the Board of Directors of Reorganized GWI PCS or the Reorganized Subsidiary Debtors for any reason, such vacancy shall be filled in accordance with the respective certificates of incorporation and bylaws; and it is further

CC. ORDERED that Roger D. Linquist, Robert G. Barrett, Joseph T. McCullen, Jr., Arther Patterson, John Sculley and C. Boyden Gray (collectively, the "GWI Directors") are hereby appointed as the initial directors of Reorganized GWI from and after 8:00 a.m. Central Standard Time on the Effective Date. Such appointments shall be deemed to be ratified retroactively by the initial holders of Reorganized GWI common stock as of the Effective Date. Nothing set forth herein shall prevent any of the GWI Directors from resigning as a Director of Reorganized GWI at any time without further Order of this Court. If a vacancy in the Reorganized GWI Board of Directors occurs for any reason, such vacancy shall be filled in accordance with the GWI certificate of incorporation and bylaws; and it is further

DD. ORDERED that the Reorganized Debtors resulting from the entry of this Order Confirming the Plan are not new entities. The transition from Debtors-In-Possession to the Reorganized Debtors is an involuntary transfer by operation of law; and it is further

EE. ORDERED that, in accordance with Section 303 of the Delaware General Corporation Law, the officers of each of the Reorganized Debtors are hereby authorized to make, execute and file with the Secretary of State of the State of Delaware restated certificates of incorporation for each of the Reorganized Debtors, substantially in the forms filed with the Bankruptcy Court as Plan Documents, each to become effective on the Effective Date; and it is further

FF. ORDERED that as of the Effective Date, neither the Debtors nor any of their respective directors, officers, employees, agents, attorneys, advisors or professionals shall have or incur any liability to any holder of a Claim or Interest for any act, event or omission arising out of, or relating to or in connection with (i) the Chapter 11 Cases, (ii) the confirmation, implementation and consummation of the Plan, or (iii) the administration of the Plan or the property to be distributed under the Plan, except for willful misconduct or gross negligence; and it is further

GG. ORDERED that the rights of the members of all classes of Claims against or Interests in the Debtors under the Plan, and the classes of Beneficial Interest Holders under the Litigation Trust, including, without limitation, the right to receive distributions on account of such claims or interests, hereafter shall be limited solely to the right to receive such distributions exclusively as provided in the Plan and the Litigation Trust Agreement, and after the date hereof, the holders of such Claims or Interests shall have not other or further rights against the Debtors; and it is further

HH. ORDERED that the Plan and its provisions shall bind the Debtors, any entity acquiring property under the Plan, and any creditors, their agents, employees, officers, directors and other representatives, whether or not the Claim or Interest of such creditors or equity interest holders is impaired under the Plan and whether or not such creditors or equity interest holders have accepted the Plan; and it is further

II. ORDERED that upon the Effective Date, the Debtors shall be and hereby are deemed to be, to the fullest extent permitted by Section 1141 of the Bankruptcy Code, discharged and released of and from any and all claims, debts and liabilities of any kind or nature whatsoever that arose before the Effective Date, and all debts of the kind as specified in Section 502(g), 502(h) or 502(i) of the Bankruptcy Code, whether or not (i) a proof of claim based upon such debt is or has been filed or deemed to be filed under Section 501 of the Bankruptcy Code; (ii) a claim based upon such debt is or has been allowed under Section 502 of the Bankruptcy Code; or (iii) the holder of a claim based upon such debt has accepted the Plan; and it is further

JJ. ORDERED that, as provided in Section 525 of the Bankruptcy Code, such discharge shall void any judgment against the Debtors at any time obtained, to the extent such judgment relates to a claim discharged pursuant to this Order, the Plan, and the Bankruptcy Code, and operates as an injunction against the commencement, continuation or prosecution of any action, the employment of process or any act to collect, recover or offset the claims against the Debtors or any of them. The Reorganized Debtors shall not be liable for any obligation, liability or claim, whether reduced to judgment, matured or unmatured, liquidated or unliquidated, fixed or contingent, secured or unsecured, legal or equitable, existing prior to, subsequent to or related to the Plan or its implementation and consummation, except as otherwise expressly provided herein or in the plan; and it is further

KK. ORDERED that, pursuant to Section 524 of the Bankruptcy Code, on and after the Effective Date, all persons who have held, currently hold or may hereafter can, shall or may hold claims against or interests in the Debtors, with respect to any such claim or interest arising prior to the Effective Date, except as expressly set forth in the Plan or the Plan Documents, are and shall be permanently enjoined from taking any of the following actions in connection with such claim against or interest in (i) the Reorganized Debtors; (ii) the Litigation Trust; (iii) any direct or indirect successor in interest to the foregoing parties; (iv) any of their property; or (v) any direct or indirect transferring of any such property:

1. commencing, conducting or continuing in any manner, directly or indirectly, and suit, action or proceeding of any kind;
2. enforcing, levying, attaching, collecting or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree or order;
3. creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind;
4. asserting any set off, right of subrogation or recoupment of any kind, directly or indirectly; or
5. acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan and this Order; and it is further

LL. ORDERED that, as of the date of this Order, Hyundai and the Debtors and each of their respective subsidiaries, affiliates, partners, officers, directors, shareholders, agents, servants, employees, attorneys, representatives, predecessors, successors and/or assigns shall be deemed to have released each other and each of their respective subsidiaries, affiliates, partners, officers, directors, shareholders, agents, servants, employees, attorneys, representatives, predecessors, successors and/or assigns of and from any and all claims arising out of, relating to or in connection with the Hyundai Agreements; and it is further

MM. ORDERED that on and after the Effective Date, the FCC shall be and hereby is enjoined from taking any action whatsoever against the Debtors to revoke their PCS licenses in connection with any claim, transaction or occurrence which arose prior to the Effective Date; and it is further

NN. ORDERED that the rate of 6.5% per annum is hereby determined to be the appropriate rate for post confirmation interest to be paid to the FCC and to the holders of Priority Tax Claims; and it is further

OO. ORDERED that the FCC Notes and all terms therein are modified pursuant to this Court's Avoidance Judgment and reinstated with the modified terms, in the forms filed as Plan Documents; and it is further

PP. ORDERED that the modified Amortization Schedules for each of the Subsidiary Debtors, reflecting the modified stream of payments for each of the Subsidiary Debtors to the FCC under the modified FCC Notes are hereby approved in all respects; and it is further

QQ. ORDERED that in the event the Avoidance Judgment is not finally affirmed on appeal, and the appellate process results in a judgment producing a claim for the FCC in an amount in excess of $60 million, the FCC's secured claim, for purposes of the Plan and treatment thereunder, shall be increased from $60 million to the lesser of (i) the amount of the claim produced by the final judgment or (ii) the amount of the claim produced by the average price per pop bought at the FCC re-auction of C Block licenses in March 1999 multiplied by the number of the pops covered by the Debtors' licenses; and it is further

RR. ORDERED that if the amount of the FCC's claim as determined on appeal is greater than the value established at the reauction, the FCC shall have an unsecured claim against the Debtors for the difference between the amount determined by the reauction and the amount determined on appeal, payable on a pro rata basis from the Unsecured Creditors' Fund with all other Unsecured Claims; and it is further

SS. ORDERED and the FCC shall be paid interest at the rate of 6.5% on any increased secured claim, pursuant to the parties' contract; and it is further

TT. ORDERED that the difference between the FCC's increased secured claim, if any, and $60 million, as determined on appeal in accordance with decretal paragraph QQ hereof, shall not be payable, either principal or interest, until the expiration of the ten (10) year term of the high yield bonds at which time principal and interest payments shall commence in accordance with the modified Amortization Schedules for the increased amounts using the same methodology as used to prepare amortization schedules approved by the Court hereby, unless the Debtors exercise their right to redeem the high yield bonds after five (5) years, in which case amortized payments to the FCC shall begin immediately following such redemption in the same manner as provided above;

UU. ORDERED that nothing in any of the Plan Documents shall be deemed to give a security interest in any of the Debtors' licenses to any entity, to the extent prohibited by applicable law, rules or regulations; and it is further

VV. ORDERED that upon the entry of this Order, all holders of Claims and other parties in interest, along with their respective present or former employees, agents, officers, directors or principals, shall be enjoined from taking any actions to interfere with the implementation or consummation of the Plan; and it is further

WW. ORDERED that the Unsecured Creditors' Credit Facility be maintained in the amount of $18 million and that no funds be disbursed therefrom until the status of the FCC's potential unsecured claim under paragraphs QQ and RR has been finally determined, or upon court order, after notice and hearing;

XX. ORDERED that any claims set forth on the Debtors' Second Amended Schedule F's and in any amended proofs of claim which have not previously been allowed are hereby allowed as scheduled or as filed to the extent not disputed, contingent or unliquidated; and it is further

YY. ORDERED that pursuant to Section 1123(b)(3) of the Bankruptcy Code, the Reorganized Debtors shall retain and may enforce any and all claims and causes of action of the Debtors, including, but not limited to, any claims for contribution or indemnification, and any claims to recover preferences or fraudulent conveyances pursuant to Sections 544, 547, 548 and 550 of the Bankruptcy Code; and it is further

ZZ. ORDERED that pursuant to Section 1145(a) of the Bankruptcy Code, (i) the issuance of (a) the Convertible Preferred Stock, the Senior Convertible Notes and the Detachable Warrants (collectively, the "Plan Securities"), (b) the $30 million Senior Note, and (c) any warrants issued to Lucent, pursuant to the Plan; (ii) the subsequent exercise of the Detachable Warrants, the Existing Warrants or any warrants issued to Lucent by such holders or transferees to purchase the securities issuable thereunder; or (iii) the conversion of the Convertible Preferred Stock or the Senior Convertible Notes into underlying common stock by such holders or their transferees, shall be exempt from registration under the Securities Act of 1933, as amended, and any state or local law requiring registration for offer or sale of a security or registration or licensing of an issuer or underwriter of, or broker or dealer in, a security. All such securities to be so issued shall be freely transferable by the initial recipients thereof, in accordance with Section 1145(a) of the Bankruptcy Code (x) except for any such securities received by an underwriter within the meaning of Section 1145(b) of the Bankruptcy Code and (y) subject to any restriction contained in the terms of such securities themselves, in the Plan, the Plan Documents or the Stockholders' Agreement dated as of December 1, 1995, as amended, among GWI and the other parties thereto; and it is further

AAA. ORDERED that in the event of a conflict between the terms of the Plan Documents and the Stockholders' Agreement dated as of December 1, 1995, as amended, among GWI and the other parties thereto, the terms of the Plan Documents shall control and shall be given effect Consummation of the transactions contemplated by the Plan Documents shall not require any consents or approvals under such Stockholders' Agreement; and it is further

BBB. ORDERED that pursuant to Section 1146 of the Bankruptcy Code, the issuance, distribution, transfer or exchange of the Plan Securities, and the creation, modification, consolidation, recording, making or delivery of any instrument of transfer (including deeds, security agreements, financing statements and other instruments of transfer) or the making, assignment or recording of any document required in order to implement the transactions set forth in the Plan or the provisions respecting the vesting of the FCC Litigation in the Litigation Trust or otherwise required in order to effectuate, implement or consummate the Plan or this Order, shall not be subject to any tax under any law imposing a document recording tax, conveyance fee, intangibles or other similar tax, mortgage tax, real estate transfer tax, mortgage recording tax, stamp tax or similar tax, and the appropriate governmental officials or agents shall be, and hereby are, directed to forego the collection of any such tax and to accept for filing and recordation any of the foregoing instruments without the payment of any such tax; and it is further

CCC. ORDERED that for purposes of Section 306(a)(1) of the Trust Indenture Act of 1939, as amended, no means of interstate commerce shall be deemed to have been used to sett the 8% Subordinated Convertible Notes due 2008 or the exercise of the $30 million Senior Note at any time prior to the Effective date; and it is further

DDD. ORDERED that for purposes of the Securities Act, none of the offers and sales of Plan Securities under the Plan, or the subsequent exercise of the Detachable Warrants, the Existing Warrants or the warrants issued to Lucent, shall be considered part of or otherwise integrated with or into any offers or sales by the Reorganized Debtors of securities pursuant to any settlement agreement or in any financing consummated on or after the Effective Date; and it is further

EEE. ORDERED that on and after the Effective Date, except for the modification of the Debtors' obligation to the FCC pursuant to the Avoidance Judgment and the payment stream to the FCC under the modified FCC Notes and modified Amortization Schedules in connection therewith, FCC rules and regulations shall govern the Debtors' relationship with the FCC, and the Debtors' ability to retain their licenses shall be dependent upon their continued compliance therewith; and it is further

FFF. ORDERED that to the extent there is any inconsistency between this Order and the Plan Documents, the terms and provisions of this Order shall govern; and it is further

GGG. ORDERED that if any provision of this Order is invalidated or otherwise reversed on appeal, it shall not effect any other provision hereof, and the remaining provisions of this Order shall remain valid and in full force and effect.

DATED: September 10, 1998

/s/ STEVEN A. FELSENTHAL
HONORABLE STEVEN A. FELSENTHAL
UNITED STATES BANKRUPTCY JUDGE

APPENDIX G

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(Case No. 397-39676 Through
Case No. 397-39689, 398-30727,
and 398-30728)

(Jointly Administered Under
Case No. 397-39676-SAF-11)

IN RE:
GWI PCS1, INC., ET AL., DEBTORS

ADVERSARY NO. 397-3492

GWI PCS1, INC., ET AL., PLAINTIFFS

v.

FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANT

[Filed: June 4, 1998]

FINAL JUDGMENT ON AVOIDANCE CLAIMS

The avoidance claims (the "Avoidance Claims") in plaintiffs' First Amended Complaint came on for trial before the Court, Honorable Steven A. Felsenthal, U.S. Bankruptcy Judge, presiding, and the issues having been duly tried and a decision on the merits rendered, based on the findings of fact and conclusions of law dictated on the record on April 24, 1998 incorporated herein by reference, and the Court's express determination, under Fed. R. Civ. P. 54(b), that there is no just reason for delay in entering final judgment on the Avoidance Claims,

It is Ordered and Adjudged that

1. the obligations that GWI PCS, Inc. ("PCS") incurred to the United States, acting through the Federal Communications Commission ("FCC"), on May 8, 1996 are not avoided because as of that date, PCS received reasonably equivalent value in exchange for those obligations;

2. the obligations that GWI PCS 1, Inc., GWI PCS 2, Inc., GWI PCS 3, Inc., GWI PCS 4, Inc., GWI PCS 5, Inc., GWI PCS 6, Inc., GWI PCS 7, Inc., GWI PCS 8, Inc., GWI PCS 9, Inc., GWI PCS 10, Inc., GWI PCS 11, Inc., GWI PCS 12, Inc., GWI PCS 13, Inc., and GWI PCS 14, Inc. (the "Subsidiary Debtors") and PCS incurred to the United States, acting through the FCC, on January 27, 1997 are avoided pursuant to 11 U.S.C. § 548(a)(2)(A) and (B)(i) & (ii), because the Subsidiary Debtors and PCS did not receive reasonably equivalent value in exchange for these obligations, and on this date, the Subsidiary Debtors and PCS were or became insolvent and were undercapitalized for the contemplated business activity they intended to pursue;

3. pursuant to 11 U.S.C. § 548(c), the obligations of PCS and the Subsidiary Debtors to the United States are reduced to a $60 million, which amount is the difference between the value of the obligations as of January 27, 1997—$166 million—and the $106 million already paid on the obligations, and which amount is secured by the licenses issued by the FCC to the Subsidiary Debtors.
4. each party shall bear its own costs;
5. this Judgment is final as to the Avoidance Claims, and pursuant to Fed. R. Civ. P. 54(b), the clerk is directed to enter it as a final judgment with respect to such claims.

DONE at DALLAS, TEXAS, this 4th day of June, 1998.

/s/ [signature illegible]
UNITED STATES BANKRUPTCY JUDGE

APPENDIX H

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CASE No. 397-39676-SAF-11
ADV. No. 397-3492

IN RE:
GWI PCS, INC., DEBTOR

TRANSCRIPT OF PROCEEDINGS

(The Court's Ruling)

BE IT REMEMBERED, that on the 24th day of April, 1998, before the HONORABLE STEVEN FELSENTHAL, United States Bankruptcy Judge at Dallas, Texas, the above styled and numbered cause came on for hearing, and the following constitutes the transcript of such proceedings as hereinafter set forth:

* * * * *

[4] P R O C E E D I N G S

MR. WIELEBINSKI: Your Honor, before you start M[s]. Schrier-Rape stepped out for one second. She'll be right back.

THE COURT: Good afternoon. This is adversary 397-3492. GWI PCS and others versus the United States acting through the Federal Communications Commission. The Court is giving a bench ruling on the avoidance of the 544 and 548 causes of action tried last week.

I would like to, first, get appearances in the courtroom. I know there are a number of folks that will be appearing by telephone. I'll get telephone appearances following.

MS. SCHRIER-RAPE: Good afternoon. Deborah Schrier-Rape of Andrews & Kurth on behalf of the subsidiary debtors.

MR. WIELEBINSKI: Good afternoon. Joe Wielebinski with Munsch Hardt on behalf of General Wireless, Inc. and GWI PCS.

THE COURT: Thank you. I'd like to get appearances for counsel appearing by phone.

Mr. Randolph?

MR. RANDOLPH: I'm here, Your Honor. Also with me from the Department of Justice are Peter Miller and Bill Rivera and Eddie Shahan. Also with me are David Horowitz and Stew Block from the FCC.

[5] THE COURT: Thank you.

MR. RAY: Hugh Ray and John Lee is here with me.

THE COURT: All right. Thank you.

MR. LEVERT: Al Levert from General Wireless.

THE COURT: What was the last appearance?

MR. LEVERT: This is Al Levert from General Wireless in Atlanta.

MS. ELKIN: This is Judy Elkin from Haynes & Boone with Hyundai Electronics.

MR. KENNON: Scott Kennon with Crowell & Moring also for Hyundai, Your Honor.

THE COURT: Anyone else? Okay. Thank you.

This will be the Court's bench ruling on the avoidance causes of action in this adversary proceeding. The Court bifurcated the avoidance cause of action from the equitable subordination cause of action and conducted a trial of the avoidance causes of action from April 13, 1998, through April 17, 1998. The Court is required to make findings of fact and conclusions of law. The Court may make its findings of fact and conclusions of law by bench ruling. This bench ruling constitutes the Court's findings of fact and conclusions of law.

Because it is a bench ruling, the Court is reserving the right and opportunity to edit or supplement or amend these findings, especially if some are not clear or not precise. [6] Because of the nature of the bench ruling the Court is not incorporating full citations. If the parties need more specific citations, they may request the Court to supplement this bench ruling.

An action to avoid an obligation under Sections 548 or Section 544 of the Bankruptcy Code constitutes a core matter over which this Court has jurisdiction to enter a final judgment.

The Court adopts the parties' stipulations of fact contained in paragraphs 1 through 114 inclusive of section A of the joint pretrial order. The Court appreciates the extent of the stipulations and the nature and timing of these bench rulings—excuse me.

It sounds like someone is taking off. We're getting some interference on the phone. I hope you can all hear all right. If it becomes too distractive, since my court reporter needs to follow this, I may need to adjust the sound or something.

Because of these stipulations and nature and timing of these bench rulings the parties should understand the findings articulated in this bench ruling should be read in conjunction with those stipulations. At the conclusion of this bench ruling the Court will adopt certain of the parties' proposed findings and conclusions of law as a further evidentiary aid. The Court will provide the court reporter with a list of those findings [7] and direct that she add the list at the foot of the transcript of this bench ruling.

I'm going to first address findings of fact concerning the value of the subject licenses on May 8, 1996; January 27, 1997; and March 10, 1997.

First, May 8, 1996. The Court finds that the fair market value of the 14 subject licenses on May 8, 1996, was $1.06 billion. The United States acting through the Federal Communications Commission constituted a willing seller. GWI PCS constitutes a willing buyer. The auction conducted pursuant to FCC regulations and governing orders from December 1995 to May 8, 1996, constituted an arm's-length transaction. Both the seller and buyer had knowledge of material facts for the transaction.

The FCC was auctioning PCS spectrum at 30 megahertz for start-up or small businesses. That auction was known as the C-Block auction. GWI PCS was a knowing buyer. Its parent, GWI, had developed a business plan to utilize the spectrum band in particular markets. GWI worked with the investment banking house of Bear Stearns to develop its business plan. Available technology supported implementation of the business plan.

Mr. Dixon testified that the debtors could operate their business at 10 megahertz, but that an engineer would prefer more. Dr. Jackson supported that testimony. He opined that CDMA technology would be sufficient for the debtor's anticipated [8] operations, but more than 10 megahertz would be advantageous. He had recommended that the FCC auction 20 megahertz.

Mr. Linquist desired to have some spectrum for a reserve for future growth and development and as a safeguard against competition. He developed several business scenarios to support his assessment of the market and business value of 30 megahertz. He developed these scenarios for presentation to capital markets. Mr. Bauman testified that GWI's business plan functions—Mr. Bauman tested the GWI business plan assumptions and found them reasonable. The FCC, however, planned to auction 10 megahertz band from the D/E/F block.

The F-Block would also be a start-up or small business auction with credit terms available from the government. The FCC had announces the D/E/F Block auctions before the C-Block auction. The government did not, however, announce the timing of those auctions. The timing of the D/E/F Block auctions affected the competitive advantages of obtaining the C-Block licenses. After the completion of the C-Block auction on June 26, 1996, the FCC announced the dates of the D/E/F Block auctions. On August 26, 1996, the FCC began the D/E/F Block auctions. The D/E/F Block auctions began before any winning bidder of C-Block auction was granted a license. On January 14, 1997, the FCC concluded the bidding for the D/E/F Block licenses.

The FCC controlled the timing of the D/E/F Block [9] auctions. The Court must therefore determine whether GWI PCS had knowledge of all material facts.

Before the C-Block auction, GWI PCS knew about the D/E/F block auctions, but not the timing of auction. They knew the details about the auction including 10 megahertz in size and terms and conditions, specifically the procedure in the F-Block credit financing. It knew the timing of the D/E/F Block auctions could affect the competitive advantages it might obtain by successfully bidding for the C-Block licenses. It knew that the FCC controlled the timing of the auction. It assumed that the FCC would conduct the D/E/F Block auctions on a timing similar to the A/B/C Block auctions.

As Mr. Linquist testified, GWI had identified the business risks when submitting its bids during the action process. He recognized the risks associated with the licensing process, the right of third persons to protect the results, the length of the process, the fact that the D/E/F Block auctions would occur, the financial risk, and the technological considerations.

Based on this, the Court concludes that GWI PCS had sufficient knowledge of material facts to assess its business risks in bidding for the licenses in the process running from December 1995 to May 1996. While the FCC controlled the timing and disclosure of the timing of the D/E/F Block auctions, GWI PCS had sufficient knowledge of the impact of the timing to [10] assess its risks in bidding in the market of the licenses. A seller need not disclose when it might release other resources which it controls for sale when the buyer has knowledge that the resources will be released for sale, and, when released, will affect the value of its purchase.

As the price of the C-Block license rose during the auction, Mr. Linquist consulted with his investment bankers at Bear Stearns who continued to advise the financial markets would support the bid price. Mr. Linquist also continued to revise his business plan in consultation with financial advisors, and concluded that the business plan would support the bid.

Professor Wilkie's analysis of the components of auction process; namely, the discounted cash flow that could be projected from obtaining and using the license, the value of the credit component of the process, and the so-called default option available at the time of the auction, supported the winning bid price.

Competing bids also supported the winning bid price. The next highest bid was 5 percent lower than the GWI PCS bid.

Thus, when the figurative hammer fell on the auction on May 8, 1996, the value of the 14 licenses obtained by the GWI entities was $1.06 billion.

The Court next addresses the value on January 27, 1997. The 14 licenses on that date had a fair market value of between 132 million and $200 million. On January 27, 1997, the licenses [11] no longer had a fair market value of $1.06 billion. Despite efforts to raise capital in the public and private markets to support the purchase price of the licenses at $1.06 billion the markets rejected that price. Bear Stearns, with other investment bankers, had attempted to raise the capital in the public markets to support GWI's operation with a $1.06 billion license purchase price only to pull the IPO because the markets failed to support the auction price.

Mr. Linquist continued to believe in that value, and he developed several business justifications to support the auction price value. Bear Stearns took his analysis to the private markets, but filed to raise the capital. Indeed, Bear Stearns and Mr. Linquist developed a road show for the private markets, but that road show never left the garage. Considering Bear Stearns compensation schedules, Bear Stearns had every incentive to raise the capital but could not do so. The market simply failed to support an operation of the debtors with a value for the licenses at $1.06 billion on January 27, 1997.

Meanwhile, at the FCC's end, several sources had advised the FCC that the market no longer supported the May 1996 auction price. The fair market value for the licenses had declined from the May 8, 1996, auction price. The question is by how much.

Mr. Peshel, a financial valuation analyst at Price Waterhouse, valued the licenses as assets considering the market income and replacement approaches. Because the licenses had not [12] been put into use by an operating company in the marketplace, Mr. Peshel testified that the discounted income approach was too speculative. Over 150 business and technological assumptions had to be made to use a discounted cash flow. Without any actual operations by GWI and its subsidiaries, the Court agrees that the discounted cash flow income method of valuation is too speculative.

Mr. Frost testified that Bear Stearns and other financial bankers assessed GWI's business plans by using stock indexes of four other PCS companies. These indexes provide a tool for, assessing the value of operating companies and can be used for comparative purposes. Thus, investment bankers considered Omnipoint as a comparable.

The use of the indexes, in turn, resulted in investment bankers considering the discounted cash flow operations of those operating companies. Mr. Peshel testified that the use of the discounted cash flow for those operating companies on the PCS index would be viewed as too speculative for the investment markets to actually value the licenses in the hands of a start-up, nonoperating company.

The Court finds that this conclusion rings true. If the public market responded at all to a debt offering by GWI, they would trade on speculation based on operating businesses in the comparable industry. The Court cannot, however, determine the value of an asset of a nonoperating company based on the [13] speculative trading, if any, of the market for the debt offering of the company. In any event, the point is academic. The market did not respond to the Bear Stearns initiatives.

The market or comparable approach and the cost approach for these assets if basically the same. Comparables are based on auctions by the FCC. The only way to replace these licenses is by purchase at an FCC auction.

Mr. Peshel used the F-Block auction for a comparable for the C-Block auction. Both were designed for start-up and small businesses. 47 CFR 24.709. They had similar eligibility requirements. Both covered the same BTAs. Under both, the winning bidders could obtain favorable financing from the FCC, 47 CFR 24.711 and 24.716, although the actual down payment and small business credit terms were somewhat different. Both had what Professor Wilkie characterized as a default option. They differed however in that the C-Block covered 30 megahertz while the F-Block covered 10. In that regard, the C-Block would compare with the 30 megahertz A and B-Blocks; while the F-Block would compare with 10 megahertz D and E-Blocks.

In effect, the eligibility requirements for the C and F-Blocks virtually assured that the start-up companies would be undercapitalized if the value of the licenses declined significantly between auction close and license issue.

The Court reads the governing legislation as a congressional mandate to target those very entities for sale. [14] But as Professor Wilkie explained, because of that, the C and F-Block auctions processes had a default option at auction time. In addition, the credit terms constituted a major and substantial similarity between the C and F-Blocks not present with the A and B-Blocks. Professor Wilkie's testimony confirmed the significance of this financing factor.

Professor Hazlett recognized that, to an economist, the credit offer would be problematic. Auctions of licenses will be an efficient method of issuing licenses with a method of revealing market assessment of value but for the substantial economic impact in the credit factor. Indeed, the C-Block note carried a 6.5 percent interest, whereas the witnesses established that the private financial markets would have commanded 14 percent.

In addition, the F-Block license auction closed in early January 1997. The FCC awarded the C-Block license to the debtors effective January 27, 1997. These similarities support Mr. Peshel's decision to use the F-Block as a comparable.

Mr. Peshel recognizes, however, that he had to adjust the F-Block comparable to recognize the additional 20 megahertz included in the C-Block license. Mr. Peshel used the average F-Block auction price, then added to it a value based on an anticipated inflation rate for 10 years to capture value from holding the additional 20 megahertz for that period of time. The license ran for 10 years.

[15] Mr. Dixon testified that the additional 20 megahertz would be desired by an engineer, but that short-term use was not on the horizon. Mr. Jackson, in substance, confirmed that position. Mr. Linquist also anticipated an economic and competitive advantage to holding the additional megahertz. Mr. Bauman, in substance, confirmed that position.

Nevertheless, Mr. Peshel appears to have underestimated the value of the 30 megahertz package, when coupled with the credit factor. A trebling of the average F-Block auction would result in a value of $132 million. While a trebling of the F-Block results may not actually equate the additional economic value of the 20 additional megahertz, it does tend to better recognize that value than merely adding an inflation factor.

Both Mr. Dixon and Dr. Jackson testified to the technological advantages of holding more than 10 megahertz, while Professor Wilkie testified to the economics of scale that may be available for efficient economic use. And Mr. Linquist, essentially, agreed with those advantages and even assessed the competitive and marketing advantages. The F-Block result should already contain the credit factor.

The FCC had concluded that the F-Block auction reflected a 75 percent marketplace price drop in the C-Block auction for 30 megahertz auctions. That factor represents a comparable adjustment. Professor Wilkie applied those results to his analytical model. He projected the discounted cash flow portion [16] of GWI's C-Block winning bid on May 8, 1996, was valued at $456 million. An adjustment by the result of the F-Block auction results in a discounted cash flow of approximately $140 million.

With Professor Wilkie's credit factor of 44 percent, the comparable value using the market and replacement valuation methods would be approximately $200 million. Since the Court assumes the down payment requirements would have been met to make the C and F-Block options comparable, no further default option, based on Professor Wilkie's testimony, need to be considered.

Furthermore, the Court notes that Mr. Linquist had suggested to the FCC the value of $180 million.

The Court turns to the government's evidence of fair market value. The government presented witnesses with impressive credentials and experience. The Court treads carefully when finding that their conclusions are not persuasive. But, indeed, the Court has reached that conclusion.

Dr. Jarrell used stock indexes to determine the value of the C-Block auctions on January 27, 1997. The indexes represent the value of operating entities in the market. GWI and its subsidiaries are not operating entities. His report used three indexes, but at trial he relied on two, a cellular index and a PCS index. Of the two, the PCS index would more closely measure GWI if it were operative. Nevertheless, neither reliably measures the value of a nonoperating start-up company, let alone [17] its primary asset.

As previously discussed, capital and equity markets would necessarily speculate to assess a value for the future operations of GWI based on the stock values of operating entities reflected on the indexes. When comparable data of fair market value for licenses valued by public markets closely in time to the issuance of the C-Block license to the debtors is available, the Court should not give way to a speculative process.

Dr. Jarrell projected a license value of $827 million based on these indexes. There is no evidence in the record before the Court to suggest that the capital and equity markets would have funded GWI with a license cost of $827 million on January 27, 1997. Rather, the evidence establishes that the capital markets flatly declined to fund GWI with a license cost at $1.06 billion.

Ms. Ham testified that the FCC has not received, to her knowledge, any suggestion or offer to purchase the licenses at 80 percent of $1.06 billion.

The Court infers from Dr. Jarrell's testimony that if the indexes he used reflect a market decline of the operating companies of 22 percent, the market decline for the licenses held by the nonoperating GWI would be substantially more severe.

Mr. Bauman testified that the debtors made reasonable business assumptions in their business plans he reviewed for the [18] relevant times. Since these assumptions were reasonable, he opined that the cash flows projected could be used to value the licenses. Mr. Linquist also thought he used reasonable assumptions. But as of January 27, 1997 the market had rejected those assumptions.

Mr. Bauman calculated a value decline of 13 percent from the May 8, 1996, auction. But he premised that value on an operating company based on Mr. Linquist's projections. The debtor's were not operating companies. Their ability to achieve the business plan was highly speculative, especially given the market rejection of their financing. The record does not support the contention that the marketplace would produce that value for the licenses on January 27, 1997.

As previously mentioned, Professor Wilkie explained the components of the auction price bid. But by January 27, 1997, the default option had been used. GWI had already paid the FCC $106 million. Professor

Wilkie used the A/B auctions for discounted cash flow of the licenses. But considering the F-Block auction prices obtained in January 1997, if he adjusted his value by the 75 percent obtained by the F-Block auction and then increased that value by 44 percent factor reflecting the credit terms, his calculation would yield a January 27, 1997, C-Block value of approximately $200 million.

The FCC's actions belie its witnesses' testimony that the value of the licenses on January 27, 1997, was in the range of [19] 800 to $900 million. The FCC delivered to the subsidiary debtors on or about March 10, 1997, but effective January 27, 1997. The actual issuance was conditioned upon the execution of the notes and security agreements. Those were executed March 10, 1997. The requirements that the licenses be conditioned on those notes is contained in the radio station authorization which is, indeed, the licenses.

About three weeks later the FCC suspended note payments. Throughout the winter the FCC conducted roundtable discussions with invited guests. The FCC received analysis from investment and financial communities suggesting a major decline in the value of C-Block licenses. The business people who had been involved in the process conveyed a similar message. In response, the FCC issued two orders offering relief to the C-Block auction winners. With limited exceptions, including Omniport, no C-Block auction winners are operative. In addition to GWI, one other has filed petition for relief under the Bankruptcy Code.

Ms. Ham testified that 94 percent of the C-Block licenses are not in use. As the Court will discuss in greater detail, the C-Block auction process has not resulted in the implementation of the Congressional mandate of Section 309 of the Communications Act. As Ms. Ham testified, the FCC is acutely aware of these developments. They tend to support a substantially greater decline in the value of the licenses than [20] the government's witnesses opined.

For these reasons, the Court finds that the evidence suggesting a value for 101 to $200 million is entitled to the greater weight. For the reasons previously articulated, the Court finds that the value fell within a range of 132 to $200 million.

Turning to the March 10 to March 13, 1997, dates. Parties agree that the value did not change from January 27th 1997 to March 13, 1997. The Court finds the value to be within a range of 132 million to $200 million.

The Court next turns its analysis to Section 548 of the Bankruptcy Code. Under section 548(a)(2) of the Bankruptcy Code, a debtor in possession standing in the shoes of trustee may avoid any obligation by the debtor that was made or incurred within one year before the filing of the bankruptcy petition; if the debtor voluntarily or involuntarily received less than a reasonably equivalent value in exchange for the obligation; and was insolvent on that date or became insolvent as a result of the obligation, or had unreasonably small capital. The debtor in possession has the burden of proof by preponderance of the evidence.

As this Court has previously held in the Southmark litigation, reasonably equivalent value requires a comparison of what went out, here the $1.06 billion debt less the $106 million down payment, with the value of what came in, here the licenses. [21] But the test does not require a dollar-for-dollar exchange. Rather, as the Supreme Court instructed in the BFP case, reasonably equivalent means approximately equal or roughly equivalent. The Court reads the Supreme Court to instruct that usually equivalent value will be based on the fair market value.

On January 27, 1997, the FCC awarded the licenses to the subsidiary debtors. Because the radio station agreement or authorization is contingent on the notes, the notes were not actually entered until March 10, but the licenses were effective January 27, 1997. Ms. Ham testified that the FCC conditionally issued the licenses on that date. On January 27, 1997, the FCC also approved the assignment of the licenses from GWI PCS to the subsidiary debtors. On March 10, 1997, the subsidiary debtors executed notes and the security agreement by which they obligated themselves to pay the FCC the aggregate of $953.7 million at six and a half percent interest per annum.

The licenses are actually contained within a radio station authorization issued effective January 27, 1997, but conditioned upon the execution of the notes and security agreement. Thus, the execution of the notes and security agreement resulted in the government issuing the licenses effective as of January 27, 1997. The debtors delivered the notes to the FCC on March 13, 1997. All these transfers took place within one year of the debtors' filing of the petition of for relief under Chapter 11 of the Bankruptcy Code.

[22] The licenses, while awarded to the subsidiary debtors effective as of January 27, 1997, required the execution of the notes and the entry of the security

agreements. Those were executed March 10, 1997. At that time the subsidiary debtors became insolvent. They had, collectively, assets of less than $2 million plus licenses valued at no more than $200 million, with debts of $953.7 million, plus intercompany claims. Indeed, they were all undercapitalized. If the obligation of the subsidiary debtors became effective on January 27, 1997, they likewise were or became insolvent at that time and were undercapitalized.

The obligation to pay the FCC $953.7 million did not satisfy an antecedent debt of the subsidiary debtors. It did not satisfy an antecedent debt of GWI PCS.

The face debt, collectively, to the FCC upon the award and issuance of the license was $953.7 million. The parties stipulated that the note had a present collection value of $613 million. In exchange for that obligation, the subsidiary debtors received licenses with a fair market value of not more than $200 million. The debtor contend that for a complete comparison, a present value assessment should be made. The Court need not perform that calculation, however. The subsidiary debtors did not obtain reasonably equivalent value in exchange for the obligation.

The government contends that the transactions and the GWI [23] entity should be collapsed both as a matter of regulatory process and as a matter of public policy.

The winning bid was fixed on May 8, 1996. On behalf of GWI PCS, GWI paid the down payment of $53 million to go with the qualified $53 million already paid, for a total of $106 million. That figure then results in the balance of the $953.7 million. If the FCC awarded

GWI PCS the license after formal application and review, GWI PCS was obligated to pay that amount. If it failed to pay that amount, it would liable to the FCC for the difference between the winning bid amount and reauction amount, if less, plus 3 percent penalty to compensate the FCC for its expenses. These remedies, set by regulation, 47 CGR 1.2204 and 24.704, sound in the nature of contract.

However, the FCC did not issue the licenses to GWI PCS on May 8, 1996, nor could it. Consequently, GWI PCS had no right to use the licenses.

Off the record.

(An off-the-record discussion ensued.)

THE COURT: We'll go back on the record.

However, the FCC did not issue the licenses to GWI PCS on May 8, 1996, nor could it. Consequently, GWI had no right to use the licenses. Whatever rights each side had on May 8, 1996, their relationship was executory. The FCC had to perform the regulatory process before issuing the licenses. GWI PCS had to wait out that process. GWI PCS had no obligation to the FCC, [24] having made the required payments, having filed the application for the licenses, and having proceeded with the regulatory process, and they would have no further obligation until the FCC issued the license.

Professor Hazlett testified that, to an economist, GWI PCS obtained on May 8, 1996, an exclusive right to apply for the licenses with an expectation of receipt of the licenses at the end of the regulatory process. Thus, when the FCC issued the licenses effective

January 27, 1997, the FCC did not—the obligations incurred on that date, did not satisfy an antecedent debt, GWI PCS having already fulfilled its May 8, 1996, obligations. In effect, as Professor Wilkie testified, GWI PCS on May 8, 1996, bought a call option. It performed its obligation. It applied for the license, paid its down payments, and saw the regulatory process through till completion. It had no other obligation until the obligation occurred on January 27 upon the award of the licenses.

Section 548 focuses on specific transfers voluntary or involuntary. According to Ms. Ham, the FCC conditionally awarded the licenses to the subsidiary debtors on January 27, 1997. The award did not become final until the execution in March of the notes and security agreement. The FCC issued the licenses to the subsidiary debtors at GWI PCS's request, and approved an assignment from GWI PCS to the subsidiary debtors on January 27, 1997. When the licenses were issued, the subsidiary [25] debtors, as assignees, became obligated to pay.

Under the regulatory process, on January 27, 1997, GWI PCS and its assignees, the subsidiary debtors, became obligated to pay the remaining balance of $1.06 billion auction price amount. If they defaulted under the regulations, they would be obligated to the difference between the winning bid and the reauction amount, plus three percent. With a right to receive the licenses effective January 27, 1997 upon the execution of the notes and security agreement.

GWI PCS and the subsidiary debtors had the rights to a $200 million asset on January 27, 1997. That is, a reauction on January 27, 1997, would have resulted in a

$200 million amount, at most. Applying that obligation to the amount of the notes, the $700 million is not a reasonably equivalent value. The $700 million difference is not a reasonably equivalent value. The obligation to pay on that date, GWI PCS and the subsidiary debtor were or became insolvent and were or became undercapitalized. They did not receive reasonably equivalent value in exchange for the obligation.

On March 10, 1997, the subsidiary debtors executed the notes and security agreement as required by the radio station authorization, actually thereby removing the condition from the grant of the licenses. The subsidiary debtors delivered the executed notes to the FCC on March 13, 1997.

January 27, 1997, is the key date for a Section 548 [26] analysis. And as the Court has held, a 548 avoidable transfer occurred on that date. The March 10, 1997, transfer must be reformed by the Section 548 judgment and the issue of the avoidability of the obligation of March 10 would be moot or resolved. That is, the execution of the notes in an amount greater than the value of licenses transferred on January 27, 1997, did not satisfy an antecedent debt of the debtors; although, the amount of note up to the value of the licenses transferred on January 27, 1997, did.

If, on the other hand, the March 1997 transfer is the operative transfer, then the same findings would apply. The subsidiary debtors were or became insolvent and were undercapitalized. They did not receive reasonably equivalent value in exchange for the obligation. The obligation did not satisfy an antecedent debt of the subsidiary debtors nor of GWI PCS.

The FCC contends that its case of the matter BDPCS, Inc. adopted October 25, 1996, stands for the proposition that GWI PCS and the subsidiary debtors are liable for the damages and penalties assessed by the FCC regs. That case involved failure to remit the required down payment. The FCC held that it could enforce its regulations. But that case is not instructive to a proceeding under Title 11 of the United States Code, and does not inform this Court's analysis of Section 548 of the Bankruptcy Code.

[27] GWI had legitimate business reasons to establish its corporation structure and to cause GWI PCS to assign the licenses to the subsidiary debtors. Mr. Linquist articulated those reasons. Ms. Ham for the FCC confirmed the FCC's understanding of those reasons. She testified that process was commonly used. The FCC approved the assignment and issued the licenses directly to the subsidiary debtors. The FCC did so after it obtained the results of the D/E/F auctions. It suspended note payments about three weeks after the subsidiary debtors executed and delivered the notes.

The separate corporations, all being separate legal entities, shall not be considered the alter ego of the parent debtor. The debtors perpetuated no sham or fraudulent transaction on the government. Indeed, the debtors acted in good faith, following all FCC regulations and rules. The government has not established the applicability of any common law alter ego theory.

The government contends, however, that federal case law recognizes situations when corporate form should be ignored, if necessary, to preserve or protect some public policy. The government asserts that policies of public convenience, fairness, and equity inherent in the

Federal Law of Communications would be undermined if affiliated corporations acting as a single business enterprise could be permitted to pay less than the winning bidding price at the auction.

[28] First, the Court would observe that the Fifth Circuit instructs bankruptcy courts to honor separate corporate entities unless exceptional circumstances exist. See, for example, the Fifth Circuit's decision in 1993 in the Sims case. Exceptional circumstances would include misuse of the corporate form, establishing the corporate form for fraudulent purpose, or to commit an illegal act, or as a sham. Or when the parent company totally dominates and controls its subsidiaries operating the subsidiaries as a mere business conduits or agent of the parent so you have a principal/agent relationship.

As the Court has found, there is no evidence of a fraud or that the corporate structure was used as a sham. GWI had legitimate business purposes for the use of the corporate form, which the FCC recognized as common and approved. The subsidiaries were not created to be a conduit or agent of the important, but to be operating entities in their respective areas of the country. This Court should, therefore, honor the separate corporate entities.

The FCC relies, however, on the D.C. Circuit's decision in Capital Telephone Company versus FCC. The D.C. Circuit held that a corporation will be looked upon as a legal entity, except when used to defeat public convenience, justify wrong, protect fraud, or defend crime. Those exceptions do not exist in this case. But the D.C. Circuit in the footnote continued that when the statutory purpose could be easily frustrated through the use [29] of separate corporate entities, a regulatory commission may look through corporate entities and treat the separate corporate entities as one for purposes of regulation.

That case involved the issue of a license by the FCC in a regulated industry, a radio paging station. In that case a corporation and its owner sought to obtain two licenses where the FCC had mandated competition. The D.C. Circuit held, in effect, that the FCC could look through the corporate entity to conclude that the corporation and its owner, if both awarded licenses, would not result in competition. That is not this case.

The subsidiaries are corporate entities fulfilling the GWI PCS purchase in the various BTAs. Assignment of the licenses to the subsidiaries does not frustrate the statutory and regulatory burden, and indeed the FCC so recognized by approving the assignment.

The FCC argues that the use of Section 548 to avoid part of obligation would frustrate the Communications Act statutory purpose. Section 548 does not concern the purposes of the regulations implementing a Communications Act, rather, it concerns the debtor/creditor relationship between the debtors and the FCC. This is not a regulatory issue, but a creditor issue. For reasons discussed below under remedies, honoring the corporate entities in this Section 548 litigation will not frustrate the statutory purpose of the Communications Act. And [30] thus, the Court need not invoke the principal of Capital Telephone Company in this adversary proceeding.

For purposes of completeness, the Court finds that other than intercompany claims and the FCC's claim, the subsidiary debtors, GWI PCS 1 through 14, may not have any allowable claims. Proof of claims filed by a law firm and printer may not be allowable as a subsidiary debtors, at least as of the time of the obligation and maybe even at the time of the bankruptcy petitions.

The parent and the subsidiaries filed consolidated financial statements and tax returns. The parent financed the subsidiaries. The parent incorporated the subsidiaries. The subsidiaries were undercapitalized. The parent pays the salaries and other expenses of the subsidiaries. The subsidiaries have no current operating businesses. The operations share the same officers and directors. Nevertheless, because the FCC approved the assignment of the licenses to the subsidiaries with an awareness of the business reasons for the corporate structure, yet at a time when it had been noticed of the results of the F-Block auction and other market developments, the corporate structure is not a sham. And as discussed below, in recognition of the debtor/credit relation between the parties, it does not frustrate the purposes of the Section 309 of the Communications Act; and, therefore, the corporate structure need not be and should not be disregarded.

[31] Off the record minute.

(An off-the-record discussion ensued.)

THE COURT: We'll go back on the record.

The obligation of $953.7 million incurred by the subsidiary debtors on either January 27, 1997, or March 10, 1997, is avoid under Section 548. GWI PCS's obligation to the FCC is similarly voided under Section 548. In effect, GWI PCS obtained, effective January 27, 1997, licenses not worth more than $200 million in exchange for the obligations which licenses it assigned to the subsidiaries. It has a claim against the subsidiaries, but the value of that claim is the value of the return of the licenses There is no reasonably equivalent value.

On May 8, 1996, GWI PCS became subject to the obligations imposed by the FCC's regulations. If GWI PCS withdrew after being declared the high bidder, the penalty provisions of the regulations would have become operable. But GWI PCS did not have an obligation to pay the remainder of the $1.06 million purchase price until it paid the remaining down payment, submitted the formal application for the licenses, and successfully obtained the licenses after the FCC's regulatory process and review. That obligation, the obligation to pay the remainder of the bid price, was not incurred until January 27, 1997, with the award of the licenses. The value of the licenses assigned to the subsidiary debtors at GWI PCS's request and with [32] FCC approval, was not reasonably equivalent to the remaining $953.7 million obligation.

The Court now turns to Section 544 of the Bankruptcy Code. GWI made the payments required by the regulations. That made its corporate entities eligible to pursue the licenses. It received a reasonably equivalent value for its payments. In addition to the default option for undercapitalized companies, suggested by Professor Wilkie, its subsidiaries ultimately received licenses worth between 132 million to $200 million effective January 27, 1997. Its interest in those licenses is preserved through equity in the subsidiaries and intercompany plan.

Furthermore, it is previously found, the auction price established the licenses on value on May 8, 1996. Whatever legal rights and obligations it obtained at that date it obtained reasonably equivalent value for its transfers.

The 1997 issuance of the licenses cannot, however, be deemed retroactive to May 8, 1996. That is simply a fiction. It did not occur. Under the regulations, it could not occur. Rather, what occurred on that date was the fixing of the purchase price of the licenses it issued by the FCC as well as regulatory default and penalty provisions with an exclusive right in GWI PCS to formally apply for the licenses.

On May 8, 1996, GWI PCS obtained a reasonably equivalent value for the auction price. Under the regulations, if on that [33] date GWI PCS defaulted, the FCC would have reauctioned the licenses. The record establishes, on that date, that the next highest bid was 5 percent less than the GWI PCS winning bid. GWI PCS may have incurred an additional 3 percent penalty to compensate the FCC for its expenses. That then is a swing of 8 percent. Thus, on May 8, 1996, GWI PCS obtained reasonably equivalent value for the obligation it incurred, 8 percent being reasonably equivalent.

Accordingly, no avoidable transfer occurred more than one year before the filing of the bankruptcy petition by the debtor. Section 544 of the Bankruptcy Code is not applicable. The Court concludes there is no avoidable transfer—no avoidable transfer occurred not covered by Section 548 of the Bankruptcy Code.

I'll now turn to the remedies. The subsidiary debtors request that the Court either reduce the obligation to the value of the licenses pursuant to Section 548 or to rescind the transactions pursuant to Sections 550 and 105 of the Bankruptcy Code. The parent debtors request that that the Court rescind the transactions. The government, without waiving its position that the debtor should not prevail, presumably would have the Court invoke the provision of the C-Block order authorizing the debtors to return the licenses with the down payments being forfeited, but the debts otherwise extinguished.

For the following reasons, the Court concludes that the [34] amount of the obligations should be reduced to the value of the licenses as of January 27, 1997. Under Section 548 the obligations incurred on January 27, 1997, or March 10, 1997, must be avoided. However, Section 548(c) permits the FCC to collect the value of the assets transferred, which would be an amount between 132 and $200 million. For purposes of Section 548(c), the FCC acted in good faith. It followed its regulatory process. Under Section 548, the net affect is to reduce the obligations by the difference between the difference of face amount of the notes and the value of licenses on January 27, 1997, with the FCC retaining its security interest to that amount.

Rescission is, of course, a common law equity remedy. The Court is convinced that it could combine its statutory powers under Section 548 and 550, with its power under Section 105 of the Bankruptcy Code to fashion a judgment of rescission, and that such a judgment would be consistent with the Court's broad authority, as a court of equity, to modify creditor/debtor relationships.

But where Sections 548(a) and (c) combine for remedy, the Court concludes that the better part of its adjudication would be to proceed with that remedy rather than to invoke Section 105 in its general equity authority. Put another way, Section 105 may be invoked if necessary or appropriate. Since Section 504 on its own offers a remedy, use of Section 105 is not necessary. [35] For reasons to be discussed, the Court finds that Section 105 is also not appropriate.

As the Court discussed with the parties at a bench conference, the Court has been concerned about the question of whether Section 548 may appropriately be used to assist nonoperating debtors in organizing their businesses rather than reorganizing the debt of their operating business. The Court has approached the matter, however, by first applying the provisions of 548, and then, having found an avoidable obligation, considering the remedies.

The Court had anticipated not addressing the debtor's use of the Section 548 judgment until presented with a proposed plan of reorganization. But the Court's analysis of the appropriate remedy, based on the record of this adversary proceeding, has resulted in a determination that Section 548 may be used to, in effect, write down the amount of the debt owed to the government. Ironically, the Court has not only concluded that 548 may be invoked, but its application to this case facilitates the overall objective of the Bankruptcy Code while similarly providing the debtors and the FCC with a congressional vehicle to realize the congressional goals of Section 309 of the Communications Act.

A judgment pursuant to sections 548(a) and (c) results in the debtors incurring an obligation that is reasonably equivalent to the value of the licenses when actually issued, [36] and, thus, when available for the debtor to actually use in the market. With that obligation, the debtors may promptly formulate a plan of reorganization. Assuming the capital markets responded favorably, the debtors have the prospect of confirming a plan of reorganization by mid-June or early July of 1998. A prompt effective date would mean that the debtors could be operational by mid-summer.

The same relief would be necessarily accorded GWI PCS. In effect, the debt owed to the government by GWI PCS would be reduced to the value of the licenses that would have been issued to it but for the assignment.

I'm going to take a pause for minute.

We'll continue.

Given its right and remedies against the subsidiary debtors, it will receive a reasonably equivalent value. GWI, in turn, given its rights and remedies against the subsidiary debtors will have received reasonably equivalent value for its payments to the government.

The government contends that this will produce an equity windfall beyond the need to act for the best interest of the bankruptcy estates. The government draws on the provisions of Section 550 for this argument, which are not applicable to relief limited to Section 548. Thus, the Court need not address the government's argument. But the Court does observe that until operative with its equipment and working capital debt [37] incurred and satisfied and the license obligations satisfied, little, if any, equity value will be realized. But when realized, that will likely mean the debtors have utilized the spectrum in the market, which is precisely what Congress mandated. So the Court turns its consideration of remedies to Section 309 of the Communications Act.

Under Section 309(j)(2) of the Communications Act, the FCC has been charged by Congress to determine a competitive bidding process that will promote the objectives of Section 309(j)(3). In that subsection Congress articulated four objectives: One, development and rapid deployment of new technologies, products, and services for the benefit of the public without administrative or judicial delays.

Two, promote economic opportunity and competition by disseminating licenses among a wide variety of applicants, including small business.

Three, recover for the public a portion of the value of public spectrum.

Four, provide for the efficient and intensive use of the electromagnetic spectrum. These specific mandates follow the general objective articulated in Section 1 of the Communications Act to make available, so far as possible, to all people of United States a rapid, efficient, nationwide, and even worldwide wire and radio communication services.

Ms. Ham testified that the FCC considers this mandate [38] essentially required that it use the auction process to promptly and efficiently issue licenses for use and development in the market place. This requirement notwithstanding, Ms. Ham further testified that the FCC had to temper that goal with a corresponding need to assure the integrity of the auction process, for fairness to both winning and losing bidders and for precedental impact on future auctions.

Ms. Ham reluctantly recognized another factor, moreover, the factor that the FCC did not seek and apparently does not relish. For C-Block licenses, Congress mandated that the FCC become, in effect, a lending institution. The FCC is not accustomed to wearing the creditors' hat. Ms. Ham did not even want to concede that the FCC played that role in this case even though in the underlying bankruptcy case it filed proofs of claim based on the notes and security agreements, a filing that sounds in debtor and creditor relations.

Ms. Ham testified that the FCC appeared and performed as a regulator. The Court understands from that testimony and indeed from the C-Block orders, that it is the regulator function by which the FCC used its role and makes it contribution to the public welfare.

That notwithstanding, Congress charged it with a lender function. I'm reminded of an analysis of the roles of the FDIC by the late circuit Judge Irving Goldberg in the 1988 Condit case in the Fifth Circuit. Although that case dealt with a very [39] different subject matter, his analysis of dual role of the FCC is instructive. He wrote the FDIC wears two hats. One as an insurer and one as a receiver. He cautioned that parties and the Court must recognize when the FDIC changes its hats as it shifted its efforts to collect obligations owed by Condits to the failed bank. He said, quote, "Removing the ten-gallon hat it wore as receiver, it donned the bowler of FDIC-corporate," close quote. The FCC must make this same realization. Although, unlike the FDIC, it is not accustomed to debt collection and debt restructuring. The FCC wears different hats for different purposes. Here it must set aside its ten-gallon regulator hat it its banker's bowler.

The FCC has been struggling with the C-Block situation for several months. The FCC has issued remedial orders. In that regard, it has addressed its regulatory function unaffected by this bankruptcy process. But this proceeding it confronts its role as a creditor. And, it is in that function, that this Court concludes Section 548 provides a congressional remedy by which to potentially complete the mandate of Section 309 of the Communications Act.

The avoidance of the obligation above the value of the licenses when issued by the FCC should promptly restructure the debtor/creditor relationship. The FCC will recover for the public the value of the public spectrum at time it was actually made available for commercial use, as mandated by Congress. [40] Without further auctions, the spectrum as licenses issued to the debtor could be available for development and rapid deployment for the benefit of the public as mandated by Congress. Even though the FCC has struggled with the C-Block issue for a considerable period of time, further administrative and judicial delays should be eliminated by the relief available by Section 548. While the Court recognizes that the financial markets will be the key to a prompt confirmation process, the parties may eliminate all further administrative and judicial delays as mandated by Congress.

The evidence at trial established that the C-Block auction with the under capitalized smaller or start-up businesses mandated by the Communications Act and credit terms likewise mandated, skewed the auction process and resulted in the complicating factors that emerged in this trial. While Congress mandated that the FCC proceed with the conditions imposed on the C-Block process, Congress provided a remedy for prompt correction of the debtor/creditor problem through the use of Section 548 and other provisions of the Bankruptcy Code, thereby permitting, maybe ironically and probably unintentionally, a vehicle for the implementation of its mandate to have the spectrum bands as licenses developed and used in a competitive market that includes small, start-up business.

As the experts testified at trial, the technology is available for sufficient and intensive use of the spectrum as [41] mandated by Congress. Thus, the remedies of Section 548(a) and (c) adjust the debtor/creditor relationship consistent with the goals and scheme of the Bankruptcy Code and coincidentally it ironically places the debtor and the FCC in a position to complete the mandate of Section 309 of the Communications Act as far as these 14 licenses are concerned should the financial capital markets positively respond to a Chapter 11 plan.

While recognizing always the appropriateness of judicial restraint but taking issues as they arise in the context of cases and proceedings, the Court has concluded that the weighing of the alternatives remedies required this analysis of the mandate of Section 309.

The Court also considers the impact of the alternative remedies on the integrity of the auction. The evidence established that the nature of this auction, the default options for the undercapitalized businesses participating in the auction, and credit-term impact, coupled with the timing of the D/E/F Block auctions and other developments, such as various presidential announcement concerning the UHF channels, compromised this particular auction. The Court has found this situation puzzling if not troubling. The restrictions under CFR of small businesses to qualify for the discounts and credit of these auctions virtually assured if the market conditions deteriorated between the time of the auction and completion of the regulatory process, they would likely be undercapitalized or [42] insolvent by Section 548 standards.

To the extent the FCC had been legislatively handed this predicament, Title 11 has provided a remedy. The availability of Section 548 for debtors who could meet their burden of proof that a constructive fraud, fraudulent conveyance has occurred merely serves to remedy the problem, and in doing so, advances the Congressional goals. That precedent may actually enhance the process. The FCC may actually be able to rely on available debtor/creditor remedies to address the problems of this auction without the need for further remedial regulatory auction. The FCC may then proceed with its primary regulatory responsibilities.

Rescission, on the other hand, would result in the reauction of 14 C-Block licenses. Unless the debtors cannot raise build-out and working capital loans for the restructured debt, rescission will delay the development and rapid deployment of the licenses by small businesses frustrating the Congressional mandate of Section 309 of the Communications Act, and will result in further administrative and judicial delay, also contrary to the Congressional mandate.

The government contends that a return of the licenses with a forfeiture of $106 million is the appropriate remedy. While the parties may certainly settle on that option, it is not a rescission remedy because it leaves the government with the $106 million.

[43] The government also raises concerns with the regulatory provisions of the licenses resulting in revocation of the licenses upon default on the outstanding obligation. That consideration, the Court recognizes, weighs in favor of rescission. But rescission results in a delay frustrating the Congressional mandate, whereas a debt reduction under Section 548 would leave the license revocation provision in tack, only altering the payment obligation amount.

Since the Court has an available and appropriate remedy under Section 548, the Court need not and does not invoke a remedy under 105. That decision has the salutary effect, this Court submits, of advancing rather than hindering the mandate of Section 309.

Conclusions: The Court has found the value of the licenses on January 27, 1997 and March 10, 1997 at between 132 and $200 million. The Court cannot render a judgment under Sections 548(a) and (c) based on range. The Court must derive a specific dollar amount. The Court concludes the best inference to be drawn would be within this range is a half-way point. Thus, the Court will enter a judgment avoiding the obligations of GWI PCS and the subsidiary debtors above $60 million, which reflects a value of $166 million less $106 million paid to FCC to debt.

The Court will provide the court reporter with a list of several proposed findings of fact submitted by the parties, [44] which the Court will adopt to its finding, to add more precision and specifics to these orally stated findings. The Court is not going to take the time with the parties to do so this afternoon. But when I go off the record, I will give those to the reporter.

While that completes the ruling the Court does hasten to add that while having rendered this judgment in the adversary proceeding, the underlying bankruptcy cases must continue. The debtors must pursue a plan, and in doing so, must continue to negotiate with the FCC. The debtors in the nature or spirit of compromise and settlement may certainly offer a different amount, such as the top of the range, without offending this decision. Put another way, the Court having now resolved the adversary proceeding, the Court expects the parties to make use of the decision. If you reach some other settlement that is satisfactory to both parties, the Court will not offended.

The Court will ask counsel for the debtors to, please, prepare a judgment consistent with these findings and conclusions.

Sorry it took so long, but I tried to cover as much as I could to give you a comprehensive ruling. Unless there are any questions, I'll disconnect the phone.

MR. RANDOLPH: Your Honor?

THE COURT: Mr. Randolph?

MR. RANDOLPH: Your Honor, would you let us know or have the clerk's office let us know when that judgment [45] has been entered?

THE COURT: Yes. I'll ask—Ms. Schrier-Rape will draft it, and she'll send a copy to you. When it is submitted and when it is signed, I will send a cover letter to the parties informing you that I forwarded it to the clerk's office for entry.

MR. RANDOLPH: We would also like the opportunity to see, prior to the time that the proposed order is submitted to you, a proposal from GWI so that we can be sure it is consistent with our understanding of the Court's ruling before that is submitted to you. So we can hopefully be on the same page with the debtors on exactly what that proposed order will say.

THE COURT: Ms. Schrier-Rape?

MS. SCHRIER-RAPE: I will be happy to submit it to Mr. Randolph first.

THE COURT: Thank you.

MR. LEE: Your Honor?
THE COURT: Who is this?

MR. LEE: This is John Lee. This would be a final judgment, because based on this ruling the equitable subordination relief that was set for separate trial would be denied as moot; right? All other relief would be denied as moot?

THE COURT: Well, let me put it this way, if [46] the plaintiffs want to withdraw the equitable subordination, that is fine; if not, the parties want to agree that I should enter a separate judgment under Rule 54, if the parties agree to that, I'll certainly do it.

MR. RANDOLPH: We also have counter-claims. I don't think this resolves all the issues in the adversary proceeding.

MR. LEE: We would enter a separate judgment under Rule 54; correct?

THE COURT: Well, you can discuss it. If parties agree to go with a separate judgment, I'll certainly enter it.

MR. LEE: Okay.

THE COURT: Do you have what you need?

MS. SCHRIER-RAPE: Yes. Thank you, Your Honor. It was very comprehensive, and we appreciate the effort it must have taken to do it this quickly.

> (The Court adopts the following as its findings of fact for the plaintiff's proposed findings: 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 46, 47, 48, 49, 50, 51, 55, 57, 58, 59, 60, 62, 63, 68, 69, 70, 71, 72, 73, 77, 143, 145, 146, [47] 147, 149, 150, 151, 152, 153, 154, 160, 161, 162, 163, 166, 167, 169, 170, 171, 172, 173, 175, 179, 180, 181, 182, 184, 185, 186, 187, 188, 190, 191, 194, 195, 196, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 235,

237, 258, 259, 312, 342, 343, 344, 345, 346, 347, 348, 349, and 350.)

(The Court adopts the following as its findings of fact from the government's proposed findings: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 18, 20, 23, 24, 25, 27, 29, 31, 32, 33, 34, 35, 36, 37, 41, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 90, 108, 109, 110, 150, 151, 157, 160, 161, 164, 166, 167, 168, 169, 182, 183, 188, 189, and 199.)

(End of Court's ruling.)

* * * * *

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 98-11123

IN RE: UNITED STATES OF AMERICA,
PETITIONER

Petition for Writ of Mandamus and/or Prohibition to the United States District Court for the Northern District of Texas, Dallas

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[Filed: Oct. 7, 1998]

Before: DAVIS, DUHE, AND PARKER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that Respondent's motion for leave to file a response to the emergency petition for stay of bankruptcy court's orders pending resolution of appeals is GRANTED.

IT IS FURTHER ORDERED that Petitioner's motion for leave to file a reply supporting emergency petition for stay of bankruptcy court's orders pending resolution of appeals is GRANTED.

We have considered the petition for stay of the bankruptcy court's orders and determined that it should not be granted.

IT IS THEREFORE ORDERED that the emergency petition for stay of bankruptcy court's orders pending resolution of appeals treated as a petition for writ of mandamus is DENIED.

IT IS FURTHER ORDERED that the stay issued by Chief Judge Politz filed September 30, 1998 is lifted.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-11128

UNITED STATES OF AMERICA, PETITIONER

v.

GWI PCS 1, INC., ET AL., RESPONDENTS

On Petition for Emergency Stay

Filed: September 30, 1998]

ORDER

BY THE COURT:

Upon consideration of the United States' "Emergency Petition for Stay of Bankruptcy Court's Orders Pending Resolution of Appeals or, in the Alternative, for Temporary Stay to Protect Jurisdiction to Consider this Emergency Petition" and the pertinent authorities, and, further, considering the emergency status in this court's operation occasioned by Hurricane Georges,

IT IS HEREBY ORDERED that the effect and implementation of the Avoidance Decision (entered by the United States Bankruptcy Court for the Northern District of Texas on June 4, 1998) and the Confirmation

Decision (consisting of the bankruptcy court's September 10, 1998 order confirming the Plan and the bankruptcy court's September 15, 1998 revised transcript of the September 9, 1998 bench ruling) be stayed to preserve the status quo and jurisdiction until the district court and this court, the United States Court of Appeals for the Fifth Circuit, have an appropriate opportunity to determine whether to stay the Avoidance Decision and the Confirmation Decision until appeals therefrom are finally resolved.

September 30, 1998

HENRY A. POLITZ
HENRY A. POLITZ, Chief Judge

APPENDIX K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

398-CV-1704L

UNITED STATS OF AMERICA, APPELLANT

v.

GW1 PCS 1, INC., ET AL., APPELLEES

[Filed: Sept. 30, 1998]

ORDER

The court, upon consideration of Appellant's Emergency Motion for Stay of Order of Confirmation And Renewed Motion for Stay of Judgment on Avoidance Claims and Appellant's Emergency Motion for Extension of Stay, and the parties responses and replies, finds that said motions should be denied.

The criteria for granting a stay pending appeal require the party who seeks the stay to show: 1) likelihood for success on the merits; 2) irreparable injury if the stay is not granted; 3) absence of substantial harm to the other parties from granting the stay; and 4) service to the public interest from granting the stay. *Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1067 (5th Cir. 1986). After due consideration of these factors, the court concludes that appellant fails to meet the criteria.

Therefore said motions are hereby denied.

IT IS SO ORDERED.

Entered this 30th day of September, 1998.

SAM A. LINDSAY
Sam A. Lindsay
United States District Judge

APPENDIX L

[Seal omitted]

United States of America
Federal Communications Commission
RADIO STATION AUTHORIZATION
Commercial Mobile Radio Services
Personal Communications Service – Broadband

GWI PCS1, INC.
8144 WALNUT HILL
LANE
SUITE 600
DALLAS, TX 75231

Call Sign: **KNLF566**
Market: **B404**
SAN FRANCISCO-
OAKLAND-
Channel Block: **C**
File Number*:* **00447-CW-L-96**

The licensee hereof is authorized, for the period indicated, to construct and operate radio transmitting facilities in accordance with the terms and conditions hereinafter described. This authorization is subject to the provisions of the Communications Act of 1934, as amended, subsequent Acts of Congress, international treaties and agreements to which the United States is a signatory, and all pertinent rules and regulations of the Federal Communications Commission, contained in the Title 47 of the U.S. Code of Federal Regulations.

Initial Grant Date . . . . **January 27, 1997**
Five-year Build Out Date . . . . **January 27, 2002**
Expiration Date . . . . **January 27, 2007**

CONDITIONS:

Pursuant to Section 309(h) of the Communications Act of 1934, as amended, (47 U.S.C. § 309(h)), this license is subject to the following conditions: This license does not vest in the licensee any right to operate a station nor any right in the use of frequencies beyond the term thereof nor in any other manner than authorized herein. Neither this license nor the right granted thereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934, as amended (47 U.S.C. § 151, et seq.). This license is subject in terms to the right of use or control conferred by Section 706 of the Communications Act of 1934, as amended (47 U.S.C. § 606).

Conditions continued on Page 2.

WAIVERS:

No waivers associated with this authorization.

CONDITIONS:

This authorization is subject to the condition that, in the event that systems using the same frequencies as granted herein are authorized in an adjacent foreign territory (Canada/United States), future coordination of any base station transmitters within 72 km (45 miles) of the United States/Canada border shall be required to eliminate any harmful interference to operations in the adjacent foreign territory and to ensure continuance of equal access to the frequencies by both countries.

This authorization is conditioned upon the full and timely payment of all monies due pursuant to Sections 1.2110 and 24.711 of the Commission's Rules and terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the licensee. Failure to comply with this condition will result in the automatic cancellation of this authorization.

Issue Date: January 27, 1997
FCC Form 463a

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11294

IN THE MATTER OF: GWI PCS 1 INC;
GWI PCS 2 INC; GWI PCS 3 INC;
GWI PCS 4 INC; GWI PCS 5 INC;
GWI PCS 6 INC; GWI PCS 7 INC;
GWI PCS 8 INC; GWI PCS 9 INC;
GWI PCS 10 INC; GWI PCS 11 INC;
GWI PCS 12 INC; GWI PCS 13 INC;
GWI PCS 14 INC; GENERAL WIRELESS INC.;
GWI PCS INC, DEBTORS

UNITED STATES OF AMERICA,
ON BEHALF OF FEDERAL COMMUNICATIONS
COMMISSION, APPELLANT

v.

GWI PCS 1 INC; GWI PCS 2 INC;
GWI PCS 3 INC; GWI PCS 4 INC;
GWI PCS 5 INC; GWI PCS 6 INC;
GWI PCS 7 INC; GWI PCS 8 INC;
GWI PCS 9 INC; GWI PCS 10 INC;
GWI PCS 11 INC; GWI PCS 12 INC;
GWI PCS 13 INC; GWI PCS 14 INC;
GENERAL WIRELESS INC; GWI PCS INC;
APPELLEES

Appeal from the United States District Court
for the Northern District of Texas, Dallas

[Filed: Dec. 22, 2000]

ON PETITION FOR REHEARING EN BANC

(Opinion 10/20/00, 5 Cir., _________, ______ F.3d ________)

Before GARWOOD, WIENER, and DeMOSS,
Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for, Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ WILLIAM GARWOOD
UNITED STATES CIRCUIT JUDGE

Chief Judge King, and Judges Jones, and Barksdale did not participate in the consideration of the petition for rehearing en banc.

REHG-6a

<u>CLERK'S NOTE:</u>
SEE FRAP AND LOCAL RULES 41
FOR STAY OF THE MANDATE.

APPENDIX N

1. Section 548(a) of Title 11 of the United States Code states as follows:

§ 548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which—

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

2. Section 301 of Title 47 of the United States Code states as follows:

§ 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

3. Section 309(j) of Title 47 of the United States Code states as follows:

§ 309. Application for license

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission—

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that—

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum; and

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed—

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall—

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall—

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraph (B), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of Title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Such offsetting collections are authorized to remain available until expended. No sums may be retained under this subparagraph during any fiscal year beginning after September 30, 1998, if the annual report of the Commission under section 154(k) of this title for the second preceding fiscal year fails to include in the itemized statement required by paragraph (3) of such section a statement of each expenditure made for purposes of conducting competitive bidding under this subsection during such second preceding fiscal year.

(C) Deposit and use of auction escrow accounts

Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in an interest bearing account at a financial institution designated for purposes of this subsection by the Commission (after consultation with the Secretary of the Treasury). Within 45 days following the conclusion of the competitive bidding—

(i) the deposits of successful bidders shall be paid to the Treasury;

(ii) the deposits of unsuccessful bidders shall be returned to such bidders; and

(iii) the interest accrued to the account shall be transferred to the Telecommunications Development Fund established pursuant to section 614 of this title.

(9) Use of former Government spectrum

The Commission shall, not later than 5 years after August 10, 1993, issue licenses and permits pursuant to this subsection for the use of bands of frequencies that—

(A) in the aggregate span not less than 10 megahertz; and

(B) have been reassigned from Government use pursuant to part B of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 921 et seq.].

(10) Authority contingent on availability of additional spectrum

(A) Initial conditions

The Commission's authority to issue licenses or permits under this subsection shall not take effect unless—

(i) the Secretary of Commerce has submitted to the Commission the report required by section 113(d)(1) of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 923(d)(1)];

(ii) such report recommends for immediate reallocation bands of frequencies that, in the aggregate, span not less than 50 megahertz;

(iii) such bands of frequencies meet the criteria required by section 113(a) of such Act [47 U.S.C. 923(a)]; and

(iv) the Commission has completed the rule making required by section 332(c)(1)(D) of this title.

(B) Subsequent conditions

The Commission's authority to issue licenses or permits under this subsection on and after 2 years after August 10, 1993, shall cease to be effective if—

(i) the Secretary of Commerce has failed to submit the report required by section 113(a) of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 923(a)];

(ii) the President has failed to withdraw and limit assignments of frequencies as required by paragraphs (1) and (2) of section 114(a) of such Act [47 U.S.C. 924(a)];

(iii) the Commission has failed to issue the regulations required by section 115(a) of such Act [47 U.S.C. 925(a)];

(iv) the Commission has failed to complete and submit to Congress, not later than 18 months after August 10, 1993, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees; or

(v) the Commission has failed under section 332(c)(3) of this title to grant or deny within the time required by such section any petition that a State has filed within 90 days after August 10, 1993;

until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 2007.

(12) Evaluation

Not later than September 30, 1997, the Commission shall conduct a public inquiry and submit to the Congress a report—

(A) containing a statement of the revenues obtained, and a projection of the future revenues, from the use of competitive bidding systems under this subsection;

(B) describing the methodologies established by the Commission pursuant to paragraphs (3) and (4);

(C) comparing the relative advantages and disadvantages of such methodologies in terms of attaining the objectives described in such paragraphs;

(D) evaluating whether and to what extent—

(i) competitive bidding significantly improved the efficiency and effectiveness of the process for granting radio spectrum licenses;

(ii) competitive bidding facilitated the introduction of new spectrum-based technologies and the entry of new companies into the telecommunications market;

(iii) competitive bidding methodologies have secured prompt delivery of service to rural areas and have adequately addressed the needs of rural spectrum users; and

(iv) small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process; and

(E) recommending any statutory changes that are needed to improve the competitive bidding process.

(13) Recovery of value of public spectrum in connection with pioneer preferences

(A) In general

Notwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommunications service or technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by—

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.

(C) Installments permitted

The Commission shall require such person to pay the sum required by subparagraph (B) in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

(D) Rulemaking on pioneer preferences

Except with respect to pending applications described in clause (iv) of this subparagraph, the Commission shall prescribe regulations specifying the procedures and criteria by which the Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service. Such regulations shall—

(i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment;

(ii) include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses under this subsection;

(iii) be prescribed not later than 6 months after December 8, 1994;

(iv) not apply to applications that have been accepted for filing on or before September 1, 1994; and

(v) cease to be effective on the date of the expiration of the Commission's authority under subparagraph (F).

(E) Implementation with respect to pending applications

In applying this paragraph to any broadband licenses in the personal communications service awarded pursuant to the preferential treatment accorded by the Federal Communications Commission in the Third Report and Order in General Docket 90-314 (FCC 93-550, released February 3, 1994)—

(i) the Commission shall not reconsider the award of preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following December 8, 1994, and the award of such preferences and licenses shall not be subject to administrative or judicial review;

(ii) the Commission shall not alter the bandwidth or service areas designated for such licenses in such Third Report and Order;

(iii) except as provided in clause (v), the Commission shall use, as the most reasonably comparable licenses for purposes of subparagraph (B)(i), the broadband licenses in the personal communications service for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment;

(iv) for purposes of subparagraph (C), the Commission shall permit guaranteed installment payments over a period of 5 years, subject to—

(I) the payment only of interest on unpaid balances during the first 2 years, commencing not later than 30 days after the award of the license (including any preferential treatment used in making such award) is final and no longer subject to administrative or judicial review, except that no such payment shall be required prior to the date of completion of the auction of the comparable licenses described in clause (iii); and

(II) payment of the unpaid balance and interest thereon after the end of such 2 years in accordance with the regulations prescribed by the Commission; and

(v) the Commission shall recover with respect to broadband licenses in the personal communications service an amount under this paragraph that is equal to not less than $400,000,000, and if such amount is less than $400,000,000, the Commission shall recover an amount equal to $400,000,000 by allocating such amount among the holders of such licenses based on the population of the license areas held by each licensee.

The Commission shall not include in any amounts required to be collected under clause (v) the interest on unpaid balances required to be collected under clause (iv).

(F) Expiration

The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on August 5, 1997.

(G) Effective date

This paragraph shall be effective on December 8, 1994, and apply to any licenses issued on or after August 1, 1994, by the Federal Communications Commission pursuant to any licensing procedure that provides preferential treatment (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service.

(14) Auction of recaptured broadcast television spectrum

(A) Limitations on terms of terrestrial television broadcast licenses

A television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond December 31, 2006.

(B) Extension

The Commission shall extend the date described in subparagraph (A) for any station that requests such extension in any television market if the Commission finds that—

(i) one or more of the stations in such market that are licensed to or affiliated with one of the four largest national television networks are not broadcasting a digital television service signal, and the Commission finds that each such station has exercised due diligence and satisfies the conditions for an extension of the Commission's applicable construction deadlines for digital television service in that market;

(ii) digital-to-analog converter technology is not generally available in such market; or

(iii) in any market in which an extension is not available under clause (i) or (ii), 15 percent or more of the television households in such market—

(I) do not subscribe to a multichannel video programming distributor (as defined in section 522 of this title) that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market; and

(II) do not have either—

(a) at least one television receiver capable of receiving the digital television service signals of the television stations licensed in such market; or

(b) at least one television receiver of analog television service signals equipped with digital-to-analog converter technology capable of receiving the digital television service signals of the television stations licensed in such market.

(C) Spectrum reversion and resale

(i) The Commission shall—

(I) ensure that, as licenses for analog television service expire pursuant to subparagraph (A) or (B), each licensee shall cease using electromagnetic spectrum assigned to such service according to the Commission's direction; and

(II) reclaim and organize the electromagnetic spectrum in a manner consistent with the objectives described in paragraph (3) of this subsection.

(ii) Licensees for new services occupying spectrum reclaimed pursuant to clause (i) shall be assigned in accordance with this subsection. The Commission shall complete the assignment of such licenses, and report to the Congress the total revenues from such competitive bidding, by September 30, 2002.

(D) Certain limitations on qualified bidders prohibited

In prescribing any regulations relating to the qualification of bidders for spectrum reclaimed pursuant to subparagraph (C)(i), the Commission, for any license that may be used for any digital television service where the grade A contour of the station is projected to encompass the entirety of a city with a population in excess of 400,000 (as determined using the 1990 decennial census), shall not—

(i) preclude any party from being a qualified bidder for such spectrum on the basis of—

(I) the Commission's duopoly rule (47 C.F.R. 73.3555(b)); or

(II) the Commission's newspaper cross-ownership rule (47 C.F.R. 73.3555(d)); or

(ii) apply either such rule to preclude such a party that is a winning bidder in a competitive bidding for such spectrum from using such spectrum for digital television service.